THE LAW

OF

LIFE INSURANCE

WITH A CHAPTER ON

ACCIDENT INSURANCE.

BY

GEORGE BLISS.

SECOND EDITION.

NEW YORK:
BAKER, VOORHIS & CO., PUBLISHERS,
66 NASSAU STREET.
1874.

73074

BAKER & GODWIN, PRINTERS,
No. 25 PARK ROW, N. Y.

PREFACE TO THE FIRST EDITION.

As this book is the direct outgrowth of my own professional practice, the story of its origin is the best justification for its publication. For several years I have been obliged to pass frequently upon questions connected with the law of Life Insurance. When this necessity arose, I found that there was no American work upon the subject published since 1854. In that year the works of Angell and of Reynolds appeared, as well as republications of the treatises of Bunyon and Ellis, the latter with some notes of American cases. These works, with a compilation by Bonney, still constitute, I believe, the American literature of Life Insurance in its legal aspects, so far as it is contained in separate works. Phillips' elaborate work treats, however, of Life Insurance in connection with Fire and Marine Insurance, and the subject is of course considered in the various works on Contract. In England, a second edition of Bunyon's work was published in 1868. It has not been reprinted in this country, though it is the ablest book upon the subject, and the following pages will show that I have been greatly indebted to it. But it contains no reference to American cases, and much of it is nearly useless here. Finding that there were no text-books of a later date than 1854, I commenced the preparation of a full abstract of all the cases upon the subject reported since that date; and when that was done, I found it convenient to extend my labor back to the prior cases. Having thus collected the necessary crude material, I was subsequently induced to undertake the preparation of this book, which has been completed amid the pressure of an active practice, and chiefly in hours stolen from recreation and rest.

The business of Life Insurance has received an enormous development within a few years. In this country it is practically a quarter of a century old (the oldest policy now in force dating from 1843), but the business received no great development till within about

fifteen years. Official statistics show that while, in 1858, there were in force less than forty-three thousand policies, insuring about one hundred and sixteen million dollars, there were, at the close of 1870, in existence nearly seven hundred and forty thousand policies, insuring nearly two thousand millions of dollars, a sum little less than the national debt—while the annual premiums had increased from less than five million dollars, in 1860, to nearly one hundred millions, in 1870. The total number of policies issued, in 1870, was over one hundred and eighty thousand. There were terminated, in 1870, by death or lapse, about one hundred thousand policies, and not less than twenty million dollars became payable, during that year, on six thousand four hundred claims arising from death. Accident insurance dates, in this country, from about 1864.

This enormous business cannot, of course, be transacted without an increasing necessity for appeal to the courts. Two-thirds of a million of continuing contracts, upon which payments of premium are ordinarily required to be made from one to four times a year, and which involve the settlement, yearly, of over six thousand four hundred claims, covering twenty millions of dollars, must inevitably occasion honest differences of opinion, which the courts alone can settle, while from the manner in which the business is transacted cases of fraud are of common occurrence. The Insurance Companies have manifested great reluctance in resorting to the courts. While they have sometimes contested losses upon grounds seemingly wholly technical, and interposed defenses apparently devoid of merit, such instances have been very rare and greatly less frequent than those in which they have submitted to what they believed to be extortion and fraud. The indications are strong that the Companies are becoming satisfied that self-preservation requires them to litigate more frequently in future. The report of the Massachusetts Commissioner of Insurance, for 1870, shows that in thirty-five companies which refer to the subject, there were, at the close of 1870, about one hundred and fifty unsettled or disputed cases, involving nearly eight hundred thousand dollars. When the United States Digest was published, in 1846, it contained, among its reported cases, only a single case of Life Insurance, being one which was decided in 1815, though the Reports show four other cases decided prior to 1850. But Mr. Bigelow's valuable collection of cases upon Life and Accident Insurance, reported prior to January, 1871, contains one hundred and nineteen such cases, occupying eight hundred pages, while he accidentally omits three which had then been pub-

lished. In the brief period which has since elapsed twenty-seven new cases have been reported, and this work contains references to twenty-two unreported cases. The publication of a Journal devoted exclusively to insurance law has been recently commenced at St. Louis.

I have intended to refer to all the reported cases published prior to September in the present year, though in the latter part of the work, I have brought my references down to a still later period. I have referred not only to the standard English and American Reports, but to those of Scotland and Ireland, which contain many instructive cases. In some of the New York cases, I have gone back of the Reports, to the original papers on file. In treating of those portions of the subject which are common to the law of Life and Fire Insurance, such as warranty, representation, agency and waiver, I have referred freely to decisions in cases of fire insurance, generally, however, indicating by the initial "F" the fact that the case was one of fire insurance where its title did not show it. The chapter on Guarantee Insurance is little more than an abridgment of that of Bunyon, adding references to a few later cases. Mr. Bigelow's book has been of great use in passing the work through the press, though it was not published till my manuscript was nearly completed. I have, however, been indebted to it for a single unreported case.

I have doubtless made errors, both of omission and commission, and shall be obliged to any one who will call my attention to them. The plan of the work is also perhaps open to criticism, but it has been adopted, after due consideration of its advantages and disadvantages, as applicable to the particular subject treated. I may at least, fairly claim for this volume that it contains the fullest presentation, which has yet appeared, of the law of Life and Accident Insurance, as found in the decided cases of America, England, Ireland and Scotland. My professional brethren will place me under obligations if they will kindly forward to me reports of any cases of Life or Accident Insurance which may, from time to time, come under their notice.

In conclusion, I acknowledge my indebtedness to several of the State Reporters and to members of the bar, for unpublished opinions and for numerous courtesies.

GEORGE BLISS, Jr.

New York, December, 1871.

PREFACE TO THE SECOND EDITION.

THE reception given to the first edition of this work has made it at once a duty and a pleasure to strive for a marked improvement in the second edition. I have, therefore, in spite of the demands of a laborious public office, bestowed upon it labor little, if any, inferior to that required for the preparation of the original work. There is hardly a page which does not bear the marks of revision and addition. The fact that, while the first edition contained a reference to only two hundred and seventy-two cases relating to life insurance (including therein both the English and the American cases) the present edition refers to not less than one hundred and sixty-three additional American cases since decided, is of itself sufficient to show that a rewriting of much of the work has been absolutely necessary. Some subjects, such as concealment, the reference to papers in the policy and evidence, have been more fully treated than before. Every case cited has been re-examined, every citation verified anew, and every quotation again compared, and yet I am fully conscious that in these and other respects there must still be errors, though, I trust, none of importance. While the plan of ample quotations from decided cases has been adhered to, the volume has been kept within reasonable limits by the omission of the chapter on Guarantee Insurance (as not being of present practical value), and of some historical matter, as well as by the excision from quotations of unnecessary passages, and by remanding to the notes some matters of minor importance. The convenience of the reader has been, it is believed, promoted by placing the section number at the top of each page, and adding brief synoptical readings to each section.

In order to bring the work down to the latest moment, I have inserted before the table of contents brief notes of such cases upon life insurance reported during the time occupied in printing the text, as could not be referred to in the proper places, giving also a reference to the sections relating to the subject.

Many members of the bar and State Reporters have rendered valuable assistance by furnishing me early and unpublished opinions, or giving information and suggestions. The third volume of Mr. Bigelow's compilation contains many of the new cases referred to in the notes, while the Insurance Law Journal, published in New York, embraces most of the more recent ones.

GEORGE BLISS.

August 15, 1874.

ADDENDA,

CONTAINING REFERENCES TO CASES REPORTED SINCE THE TEXT WAS PRINTED.

§§ 13, 27. Creditor has insurable interest in debtor's life. McKenty v. Univ. L. Ins. Co. 3 *Ins. Law Jour.* 385, *U. S. C. C. Minn.* To insure a man's life for $10,000 because he owed $10 is a gambling transaction. Fox v. Penn. Mut. L. Ins. Co. 3 *Ins. Law Jour.* 471, *Dist. Ct. of Penn.*

§ 24. A son has an insurable interest in his father's life. Kane v. Reserve Mut. L. Ins. Co. 31 *Leg. Int.* 196, *Dist. Ct. of Penn.*

§ 35. A verbal statement made on receiving a renewal receipt is a mere representation, which does not avoid the policy, unless shown to have been material, and to have induced the risk. Mut. Ben. L. Ins. Co. v. Robertson, 59 *Ill.* 123.

§ 36. The reference to Higbie v. Guardian Mut. L. Ins. Co. should be 2 *Ins. Law Jour.* 761.

§ 38. The reference to Price v. Phœnix Mut. L. Ins. Co. should be 2 *Ins. Law Jour.* 223.

§ 66. The failure to communicate a material fact not known to the assured does not avoid the policy. Mut. Ben. L. Ins. Co. v. Robertson, 59 *Ill.* 123.

§ 74. The reference to Swift v. Mass. Mut. L. Ins. Co. should be 2 *N. Y. Supreme R.* 303.

§ 79. Statements to the examining physician, in the presence of the agent of the company, are not notice to the company. Britton v. Mut. Ben. L. Ins. Co. 3 *N. Y. Supreme R.* 442.

§§ 107, 116. The insured stated, in his application, that he had never had paralysis, while in fact he had had two attacks of that disease of an alarming character. Held, that the policy was void. If the insured is asked as to a disease of well-marked symptoms, which all well-informed persons regard as affecting the general health, he is bound to speak and state the exact truth. Otherwise, as to mere temporary ailments of no pronounced type. Barteau v. Phœnix Mut. L. Ins. Co. 3 *N. Y. Supreme R.* 576; s. c. 1 *Hun.* 430.

§ 116. Misstatement as to having had any sickness within five years, or any symptoms of disease of the liver, held to forfeit policy, there having been severe functional—as distinguished from organic—disease of the liver, and the insured not only having had bilious fever—which the application disclosed,—but two sicknesses from disease of the kidneys, not disclosed. Britton v. Mut. Ben. L. Ins. Co. 3 *N. Y. Supreme R.* 220.

§ 140. Contracts made by foreign companies, without complying with the law of the State as to such companies, cannot be enforced therein, as the statute makes such acts unlawful. Franklin (F.) Ins. Co. v. Louisv. & Ark. Packet Co. 2 *Ins. Law Jour.* 897, *Ky. Ct. of Appeals. Contra*, under the Ohio statute, which is held only to operate upon the agents making such contracts, and not upon the contracts themselves. Union Mut. L. Ins. Co. v. McMillen, 3 *Ins. Law Jour.* 457, *Supreme Ct. of Ohio.* In case of a loss on a policy issued in disregard of such requirements, a carrier cannot be permitted to make this a defense to a libel, the loss having been paid by the company. The Manistee, 3 *Ins. Law Jour.* 158, *U. S. Dist. Ct. East. Dist. of Wisc.* Cincinnati Mut. Health Ins. Co. v. Rosenthal is reported 1 *Ins. Law Jour.* 813.

§ 145. If the contract is reduced to writing, it cannot be disregarded and resort be had to the prior verbal agreement to show what was intended. So held where intermediate the making of the parol agreement and the taking of the written policy, the insured received information which he was bound to disclose. Merch. Mut. Ins. Co. v. Lyman, 2 *Ins. Law Jour.* 515, *Supreme Court of U. S.*

§ 171. Permit takes effect from time intended, though post-dated. Walsh v. Ætna L. Ins. Co. 30 *Iowa*, 133.

§ 177. Phœnix Mut. L. Ins. Co. v. Bailey is reported also in 18 *Wall.* 616.

§ 179. Where the policy provided that it was in consideration of an annual premium, "to be paid on or before Oct. 31 in every year during the continuance of this policy, or within thirty days after the payments of the above shall be due and payable (or, with the consent of the company), half or quarter or thrice yearly in advance with interest, one third of which may be indorsed as a loan," &c.; it was held that a credit for the second and third installments to the end of the year was not given, but that the assured having elected to pay in thrice yearly installments, the second and third became due in four and eight months after the first; and this was so though it was provided that, in case of loss, any balance of the year's premium was to be deducted from the amount insured. Howard v. Continental L. Ins. Co. 8 *Pacific Law Rep.* 12, *Supreme Ct. of Cal.*

§ 188. Mound City Ins. Co. v. Twining is reported 3 *Ins. Law Jour.* 375.

§§ 188, 190. A policy contained the condition that after two annual payments were made the insured could have a paid-up policy for an amount equal to as many tenths of the original policy as he had paid premiums. It was the custom of the defendant to restore forfeited policies within thirty days on the presentation of a certificate of good health, and within six months on satisfactory medical examination. On November 3d, 1871, the insured made a tender of the premium due May 16th, which was refused unless he would make a new application and pass a new medical examination, which he failed to do. Insured died December, 1871. Plaintiff claimed a paid-up policy of $1,000—five annual premiums having been paid—or the whole amount she was entitled to, as might appear from the facts on trial. *Held*, that she was not entitled to recover, because, 1st, there was never any demand for a paid-up policy or offer to surrender the old one; 2d, because the insured failed to present a certificate of good health up to the time of his death; 3d, because he failed to pass a satisfactory new medical examination. Schumacher v. Manhattan L. Ins. Co. 3 *Ins. Law Jour.* 455, *U. S. C. C. E. Dist. of Mo.*

§§ 190, 377. Proof of custom to receive premiums overdue is not admissible. Busby v. N. Am. L. Ins. Co. *Court of Appeals of Maryland*, MSS.

§§ 215, 290, 308. An agent having no authority to waive the forfeiture, acting in the interest of the assured, received the unpaid part of a premium on a forfeited policy after the life insured had ended, for which he gave a receipt antedated, and forwarded the money to the company, concealing the facts as to such payment. *Held*, that the receiving of the money by the company in ignorance of such facts was no ratification of the act of the agent in receiving the money. The fact that the company, on tendering back the money so received, omitted to return certain notes given in part payment of premiums, but which the forfeiture of the policy rendered uncollectable, does not affect the rights of the parties in a suit on the policy; nor is the fact that the notes are payable to order material, where they show on their face the consideration for which they were given. Union Mut. L. Ins. Co. v. McMillen, 3 *Ins. Law Jour.* 457, *Supreme Ct. of Ohio.* Where a premium, due on June 20th, was paid to the local agent on June 28th, a receipt given by him dated June 21st, and the amount remitted to the company about July 1st, it was held, that the agent had no power to waive the forfeiture, and the company, having received it without knowledge that it was paid when overdue, had not waived the forfeiture. Bouton v. Am. Mut. L. Ins. Co. 25 *Conn.* 542, and Catoir v. Am. L. Ins. & T. Co. 23 *N. J.* 487, approved; Busby v. N. Am. L. Ins. Co. *Court of Appeals of Maryland*, MSS. As to waiver of forfeiture by receipt of premium from agents. Mut. Ben. L. Ins. Co. v. Robertson, 59 *Ill.* 123; Walsh v. Ætna L. Ins. Co. 30 *Iowa*, 133.

§§ 215, 272. The receipt of premiums after a second examination made two years after the issue of the policy, does not waive a forfeiture caused by misrepresentations in the original application, unless it positively appears that the company then learned of the falsity. Britton v. Mut. Ben. L. Ins. Co. 3 *N. Y. Supreme R.* 442.

§ 258. The reference under note 8 should be to § 265.

§ 268. Where notice stating time and place of death is given, the company waives further proofs unless it demands them. O'Reilly v. Guardian Mut. L. Ins. Co. 3 *N. Y. Supreme R.* 487.

§§ 272, 278. A statement by the president that a policy "would remain in force by virtue of what had already been paid until Nov 29, 1870," extends the time for payment of an overdue premium to that date; and it was within the authority of the president to make such a waiver of forfeiture, though the policy had a printed indorsement to the effect that no single officer had authority to make such waiver. Hayner v. Am. Pop. L. Ins. Co. 35 *N. Y. Superior R.* 266.

§§ 280, 315. Buckner v. Grosvenor is reported 3 *Ins. Law Jour.* 230.

§ 291. Estoppel by agent's acts in inducing insured to believe permit granted. Walsh v. Ætna L. Ins. Co. 30 *Iowa*, 133.

§ 298. Where the agent promised prior to the issue of the policy to call for the premiums as they became due, and told the assured to retain them till he came, and he did call for and receive two premiums, it was held that the company could not defend by reason of the non-payment of a premium which the agent did not call for, though the policy contained at its foot the usual clause that no agent could alter a contract or waive a forfeiture. O'Reilly v. Guardian Mut. L. Ins. Co. 3 *N. Y. Supreme R.* 487.

A promise by a local agent to give notice of time for payment of premium does not bind the company. Where by agreement or the course of business it is understood that payment of premium is to be made to the local agent, a tender to the latter prevents a forfeiture. Morey v. N. Y. Life Ins. Co. *Central Law Jour.* March 19, 1874; s. c. 1 *Am. Law Times, N. S.* 160, *U. S. C. C. S. Dist. of Miss.*

§ 337. Where a creditor receives from the company all that he claims on a policy issued to him, though less than the amount named in the policy, and gives receipt in full, and surrenders the policy, the administratrix of the insured cannot recover the balance from the company, even though she has an assignment of such balance made by the creditor after his surrender of the policy. McKenty v. Univ. L. Ins. Co. 3 *Ins. Law Jour.* 385, *U. S. C. C. Minn.*

§ 356. Proof of debt in bankruptcy is equivalent to the commencement of a suit. In re Firemen's Ins. Co. 3 *Ins. Law Jour.* 159, *U. S. Dist. Ct. North. Dist. of Ill.*

§ 365. The assured is only bound to prove the policy, the payment of the annual premiums, and the death in order to make out a *prima facie* case. He is not bound to set out the application and prove its truth. Mut. Ben. L. Ins. Co. v. Robertson, 59 *Ill.* 123.

§ 374. To prove death by intemperance, it must be shown that intemperance was the paramount and proximate cause of death. If the insured becomes intoxicated and dies from it, even though by proper medical attendance he could have been saved, it is death from intemperance. Otherwise if the death results from improper medical treatment. Superior Ct. of Cincinnati, La Boyteau v. N. Y. L. Ins. Co. *Chicago Leg. News*, April 11, 1874.

§§ 375, 378. Pohalski v. Mut. Ben. L. Ins. Co. is reported also 36 *N. Y. Superior R.* 211.

§ 380. Where a question is raised as to the extent of the agent's actual authority, the agreement between him and the company may be introduced by the latter. Busby v. N. Am. L. Ins. Co. *Court of Appeals of Maryland*, MSS.

§ 383. Company's published documents and rules admitted in evidence. Walsh v. Ætna L. Ins. Co. 30 *Iowa*, 133.

§ 420. An act requiring as a condition of being allowed to do business in the State a waiver of the right to remove an action to the United States court is valid. Morse v. Home Ins. Co. 30 *Wisc.* 496. This case has been argued on appeal in the Supreme Court of the United States, but not yet decided.

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LAW OF LIFE INSURANCE.

CHAPTER I.

NATURE AND DEFINITION OF THE CONTRACT OF LIFE INSURANCE.

§ 1. **History of Life Insurance in Europe.**—Though there are earlier passages which may be interpreted as having some reference to insurance upon life, probably the first distinct reference to the subject is to be found in the Guidon, "a French production formerly compiled for the benefit of the merchants trading in the noble city of Rouen." From this work, as annotated by Cleirac in "Les us et coutumes de la Mer," in 1661, Mr. Hendricks, in the Assurance Magazine,[1] translates among others the following passages: "In other countries, where the bodies of people may be captured and reduced to bondage, there are various usages for the insurance of the body and life of men, whether they be of free condition or slaves, which customs will not be mentioned here, because in France, men of whatsoever nation are of frank and free condition;" and again, "Another kind of insurance is made by other nations upon the life of men, in case of their decease upon their voyage, to pay certain sums to their heirs or creditors. Creditors even may insure their debts, if their debtor remove from one country to another; the same can be done by those having rents or pensions, so as in case of their decease to continue to their heirs such pension or rent as may be due to them; which are all stipulations forbidden as against good morals and customs, from which endless abuses and deceptions arose; whence they have been constrained to abolish and prohibit the said usages; which is also to be

[1] Cited Bunyon on Ins. 7.

prohibited and forbidden in this country." In France, the ordinance of Louis XIV, in 1681, says, "We forbid the making of any insurance on the life of men," though it was allowed upon the lives of redeemed captives. The French Code of Napoleon omitted any express reference to the subject, and most of the commentators seem to have been of opinion that under it insurance upon life was illegal.[1] Though such insurance has been permitted in France since 1820, its development has been very slow till within a few years. On January 22, 1868, the French government issued elaborate regulations for the government of life insurance companies. The Amsterdam ordinance of 1598, and the Rotterdam ordinances of 1604 and 1635, and that of Middleburg, forbade life insurance, while the civil statutes of Genoa, in 1588, forbade the insurance, without the permission of the senate, of the life of pope, emperor, kings, cardinals, dukes, princes, bishops, and other lords or persons in constituted dignities, ecclesiastical or secular. On the other hand, life insurance was permitted at Naples, at Florence, and by the ordinance of Wisbuy.[2] Though life insurance has been introduced in other countries of the continent, and numerous companies exist in Germany, which do a large business, there still remains much of the old feeling against it. In England, the first life insurance office was established, in 1699, by the Mercers' Company, as a "widow's fund," and in the following year there was established the "Society of Assurance of Widows and Orphans," but the real introduction of insurance upon life seems to date from the establishment, in 1706, under a charter of Queen Anne, of The Amicable Society for a Perpetual Assurance Office. Life insurance was, however, also carried on to some extent in England by individual underwriters, in the same manner as marine insurance. Thus Weskett, in his work on Insurance, published in Dublin, in 1783, speaks[3] of "private underwriters who insure only to

[1] Boulay Paty, Cours de Droit, tome III, 366, 368, 496, *et post.* Delvincourt, De Laporte and others agree with him. Pardessus takes a contrary view.

[2] Ordinance of Wisb. art. 66.

[3] P. 331.

pay a certain gross sum at the decease of the person whose life is insured," and the reports show several cases of this kind.[1] About the middle of the last century, the principle of life insurance was applied so extensively to what were regarded as speculative and gaming transactions, that a statute was passed in England, prohibiting any insurance upon life, unless the person for whose benefit the insurance was obtained had an interest in the life insured. This statute, known as the Gambling Act, to which reference will be made when considering the question of interest, still remains in force.[2] It was not till about the commencement of the present century that life insurance in England began to assume any great importance as a business.

§ 2. **First Case in America.**—In this country, a case in Massachusetts[3] shows its existence as early as 1812, though its legality was questioned. Chief Justice Parker says, in the case referred to:—"It has been made a question in the argument whether a policy of assurance upon a life is a contract which can be enforced by the laws of this state; the law of England, as it is suggested, applicable to such contracts, never having been adopted and practiced upon in this country. It is true that no precedent has been produced from our own records of an action upon a policy of this nature. But whether this has happened from the infrequency of disputes which have arisen, it being a subject of much less doubt and difficulty than marine insurances, or from the infrequency of such contracts, it is not possible for us to decide. By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law and are not repugnant

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[1] Wittingham v. Thornborough, Prec. in Ch. 20; s. c. Eq. Cas. Abr. 635; 2 Vern. 206; Weskett on Ins. 335; Cleeve v. Gascoigne, in Chancery, 1758, cited in Weskett, 333.

[2] An interesting account of these speculative insurances is to be found in Francis, "Annals and Anecdotes of Life Assurance." In the reports, see March v. Pigot, 5 Burr. 2802; Earl of Chesterfield v. Janssen, 1 Atk. 338, 345; s. c. 2 Ves. Sen. 126; also, Roebuck v. Hammerton, Cowp. 737; Mollison v. Staples, Park on Insurance, 909.

[3] Lord v. Dall, 12 Mass. 115.

to the general policy of the laws, or to good morals, are valid, and may be enforced, or damages recovered for the breach of them. It seems that these insurances are not favored in any of the commercial nations of Europe, except England, several of them having expressly forbidden them; for what reasons, however, does not appear, unless the reason given in France is the prevailing one, viz., 'that it is indecorous to set a price upon the life of a man, and especially a freeman, which, as they say, is above all price.' * * * This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it which leads to the violation of law, nor anything objectionable on the score of policy or morals. It must then be valid to support an action, until something is shown by the party refusing to perform it in excuse for his non-performance." But though introduced thus early, it was not until within the last twenty or thirty years that life insurance became a business of importance.

§ 3. **Definition.**—The contract of life insurance, or life assurance, is one which has been the frequent subject of definition. Baron Parke says: "The contract commonly called Life Assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life; the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same on the other."[1] Chief Justice Tindal describes it[2] as a contract in which a sum of money is paid as a premium in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency. The text writers have given similar definitions, with more or less accuracy and

[1] Dalby v. The India & Lond. L. Ass. Co. 15 C. B. 365; s. c. 3 C. L. R. 61; 18 Jur. 1024; 24 L. J. C. P. 2; 28 Eng. Law & Eq. 312.

[2] Paterson v. Powell, 9 Bing. 320.

conciseness,[1] but the best one is that given by Bunyon,[2] who says, after quoting the definition of Chief Justice Tindal: "The contract of life insurance may be further defined to be that in which one party agrees to pay a given sum, upon the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum, or certain equivalent periodical payments by another."

§ 4. **Classification of Life Insurance.**—Life insurances seem divisible into two classes: first, that in which the risk is, strictly speaking, a contingent event, or one that may or may not happen; as for example, when a premium is paid to secure a sum of money if A. should die before B., or if A. should die within a limited period; secondly, those in which the event assured against is certain, and the only element of uncertainty is the question of the length of time which will elapse before it will happen, and the sum assured become consequently payable, as when the premium is paid to receive a sum of money upon the death of A.[3] The former class is much more common in England than in this country.

§ 5. **Meaning of Terms.**—The party receiving the premium and undertaking to make the payment, is termed the assurer or insurer; the party paying the premium and to whom or

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[1] Ellis on Ins. 101; Marshal on Ins. (Am. ed. of 1810), 766; Park on Ins. (London ed. of 1842), 905; Angell on Ins. § 274; Hughes on Ins. 497; 1 Phillips on Ins. § 147; 3 Kent Com. 439. The references to the works of Park and Marshall are always to these editions respectively.

[2] Bunyon on Ins. 1. The reference here as elsewhere is to the second London edition, published in 1868. The code of Georgia (§ 2776) defines life insurance as a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured, or of another, in whose continuance the assured has an interest. Other definitions are given in Law v. Lond. Indisp. L. P. Co. 1 Kay & Johns. 223; Trenton Mut. L. & F. Ins. Co. v. Johnson, 4 Zab. 576; St. John v. Am. Mut. L. Ins. Co. 3 Kern. 31. The Supreme Court of Massachusetts, says, a contract by which one party promises to make a certain payment upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration or the mode of estimating or securing payment of the sum to be insured in case of loss. Comm. v. Wetherbee, 105 Mass. 149.

[3] Bunyon, 5.

to whose representatives payment is to be made, the assured or insured; the contingency assured against, the risk; and the written instrument containing the contract, the policy. The premium is paid either in one sum, in which case it is termed a single premium, or by a succession of periodical payments, usually yearly or half-yearly, made either during the entire continuance of the risk or for a limited period.[1] There has recently been some attempt to give more precision to the nomenclature of life insurance, by applying the term "the insured" to the person whose life is insured, and the term "the assured" to the person or persons for whose benefit the insurance is effected. Where a person insures his own life, without naming any other person to receive the money, he would, if such nomenclature were adopted, be at once the insured and the assured. Such a distinction in the use of language would be a matter of great convenience, and will be followed as far as possible in this treatise, but it can hardly be said to be fully established. In England it is very common to designate the person whose life is insured briefly as "the life," while one text writer in this country[2] has adopted the term, "the life-insured," to designate such person.

§ 6. **Forms of Insurance.**—The ordinary form of life insurance, which is the insurance of the life of a person, in consideration of an annual, semi-annual or quarterly premium payable till his death, when the sum insured becomes payable to the person entitled to the benefit of the policy, has been of late years greatly varied, especially in this country. Forms of insurance have been introduced in which the annual premiums are payable only for a limited number of years, but the sum insured is not to be payable till the death of the person insured, which may not be for many years after the payment of premiums has ceased. Another form of insurance, known as "endowment insurance," provides for the payment of the sum insured to the person whose life is insured, if he lives a certain length of time, or if he dies before that time, to some other

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[1] Bunyon, 1; Phillips, § 2.

[2] Parsons' Mercantile Law, 540.

person indicated.[1] There are still other modifications and combinations of the system, most of which have some appar-

[1] In Briggs v. McCullough, 36 Cal. 542, it appeared that there was a statute, providing that "no money, benefit, right, privilege, or immunity accruing, or in any manner whatever growing out of any life insurance on the life of the debtor," should be taken in execution, and an attempt was made to reach an endowment policy in that way, but the court decided that it could not be done. They say, "It is urged that the policy in this case is not an insurance on the life of McCullough in the sense of the statute, but is simply a covenant by the company, that in consideration of a certain sum deposited by McCullough, the company will pay him, at the expiration of ten years, or sooner if he dies, a certain other stipulated sum, together with such dividends as his deposit shall in the mean time have earned. The term 'life insurance' is not alone applicable to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age. It is simply an undertaking, on the part of the insurer, that either at the death of the assured, whenever that event may occur, or on his death, if it shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form it is, strictly speaking, an insurance on the life of the party. In this case the policy was to become payable on the death of McCullough, provided he died within ten years, and it is to that extent certainly an insurance on his life. It is an undertaking to pay the stipulated sum if he shall die within a specified term, which is of the very essence of life insurance. The fact that the company is to pay the agreed sum at the expiration of ten years, even though McCullough shall not have died in the mean time, does not divest it of its character of life insurance. It is only a new and additional element in the contract not inconsistent with its other, which is its chief constituent part, to wit: the undertaking to pay on the death of the assured within the specified term. We think, therefore, that this was an insurance on the life of McCullough."

In Comm. v. Wetherbee, 105 Mass. 149, the court say: "Neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract."

Referring to the case before them, the court say: "The subject insured is the life of the member. The risk insured is death from any cause not excepted in the terms of the the contract. The assured pays a sum fixed by the directors and not exceeding ten dollars, at the inception of the contract, and assessments of two dollars each annually, and of one dollar each upon the death of any member of the division to which he belongs, during the continuance of the risk. In case of the death of the assured by a peril insured against, the company absolutely promises to pay to his representatives, in sixty days after receiving satisfactory notice and proof of his death, 'as many dollars as there are members in' the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived from the assessments collected upon his death from other members, from the money received upon issuing their certificates of membership, which the by-laws declare may, after payment of expenses, be 'used to cover losses caused by the delinquencies of members;' and from the guaranty fund of one hundred thousand dollars, established by the corporation under its charter.

"This is not the less a contract of mutual insurance upon the life of the assured, be-

ent or real advantages, but it may safely be said that the ordinary form of life insurance is, as a general thing, the best, both for the insurer and the insured, though the other forms, especially the endowment policies, give to the companies large present assets, and to the agents large present commissions.

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cause the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of non-payment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, to be forfeited to the company. The fact offered to be proved by the defendant, that the object of the organization was benevolent, and not speculative, has no bearing upon the nature and effect of the business conducted and the contracts made by the corporation."

CHAPTER II.

WHO MAY PROCURE AND WHO MAY GRANT INSURANCE; INCLUDING THE INTEREST NECESSARY TO SUPPORT A POLICY.

§ 7. **Interest.**—It is the general rule of law that no person can procure a valid insurance upon a life, unless he has an interest in such life; but there is a marked difference between the law of England and that of America as to the nature of the interest required. As the English decisions upon the subject of the interest necessary to support a policy are affected more or less by statute law, it will be convenient to refer to them first, and then to examine the American cases.

§ 8. **English Gambling Act.**—The evils actually experienced or anticipated from the abuse of life insurance[1] led, in 1774, to the passage in England of a statute,[2] which has remained in force to the present time, and has introduced into the law of England limitations and qualifications not applicable in this country. Of this statute a recent English writer

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[1] *Ante*, § 1.

[2] 14 Geo. III, ch. 48. This statute, entitled "An Act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured," is as follows:

"Whereas it hath been found by experience that the making insurances on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming; for remedy whereof be it enacted, &c., That, from and after the passing of this act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever. And be it further enacted, That it shall not be lawful to make any policy or policies on the life or lives of any per-

says:[1] "It is scarcely too much to say that in modern times it has never availed to prevent an illegitimate transaction, and has never been put in force, except to evade a just claim." The fact that none of the evils which it was intended to prevent seem to have arisen in Ireland, where the statute till recently had no application,[2] nor in this country, where it is not in force, and where the decisions of the courts have construed the common law as to wagers very liberally, would seem to confirm the view that such a statute is unnecessary at present.[3]

§ 9. **Is a Wager Policy upon Life Void at Common Law?**—A question, which is of some importance in this country, has been raised whether, independently of any statute, an insurance upon life, where there was no interest in the life insured, is valid; in other words, whether by the common law a wager policy upon life is void. The English judges seem not to be agreed upon this question. In Crawford v. Hunter,[4] Justice Gross says with great force, that whoever reads the Gambling Act must see that "before that time a wagering policy was not illegal. The words of that statute clearly show that before that time any person might have insured without interest; therefore, it is not necessary to aver interest in any case not prohibited by that act." And in British Commercial Insurance Company v. Magee,[5] Bushe, C. J., says: "No authority has been cited to show that such an insurance has been held illegal, as being against policy or morals in any case decided in England before the statute;

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son or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote. And be it further enacted, That, in all cases when the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

[1] Law Mag. and Law Rev. vol. 28, February, 1870, p. 193, 194.

[2] By 29 and 30 Vict. c. 42, passed in 1866, the "Gambling Act" above referred to has been extended to Ireland.

[3] See Trenton Mut. L. & F. Ins. Co. v. Johnson, 4 Zab. 576.

[4] 8 T. R. 14, 24.

[5] Cooke & Alc. 182.

* * the statute recites 'that making insurances on lives or other events in which the assured shall have no interest has been found by experience to have introduced a mischievous kind of gaming,' * * recognizing the frequency of the practice and the necessity for preventing it in future." In Dalby v. India & London Life Assurance Company,[1] as reported in the Jurist, Parke, B., is reported to have observed, during the argument, "The word 'declared' is not used in it, so that it would not affect existing contracts." This case seems to hold expressly that at common law wager policies upon life were not legal, but when counsel *arguendo* in Shilling v. The Accidental Death Insurance Company,[2] referred to the fact that Baron Parke, in delivering the judgment of the court in the case of Dalby, had pointed out that "a contract to pay a fixed sum on the death of a person would have been unquestionably legal at common law, if the insurer had an interest therein or not," he was interrupted by Pollock, C. B., with the remark, "I do not assent to that." In Ireland, where the Gambling Act has not applied till recently, it has uniformly been held that a wager policy upon life was valid.[3] In this country there has been a similar difference of opinion. Chancellor Walworth, of New York, in a case decided by him as arbitrator,[4] held that at common law a policy without an interest was not invalid, and the Superior Court of the city of New York came to the same conclusion,[5] but the Court of Appeals, in the same State, after declining to decide the question in one case,[6] was compelled to meet it in a subsequent one, and after an examination of all the reported decisions on the subject, held, that wager policies

[1] 18 Jur. 1024; s. c. 15 C. B. 365; 3 Com. Law R. 61; 24 L. J. C. P. 2; 28 Eng. Law & Eq. 312.

[2] 2 H. & N. 42.

[3] 3 Irish Law Rec. 108; Brit. Comm. Ins. Co. v. Magee, Cooke & Alc. 182; Shannon v. Nugent, 1 Hayes, 536; Scott v. Roose, 1 Longf. & Towns. 54, 59; s. c. 3 Ir. Eq. R. 170.

[4] Leonard v. Eagle Life & Health Ins. Co. 4 Livingston's U. S. Law Mag. 286.

[5] St. John v. American Mut. L. Ins. Co. 2 Duer, 419.

[6] Valton v. National Fund L. Ass. Co. 20 N. Y, 32, 38.

upon life are void at common law.[1] The law of Massachu-

[1] Ruse v. Mut. Ben. L. Ins. Co. 23 N. Y. 516. In this case Judge Selden, in delivering the opinion of the court, says: "Our inquiry therefore is whether at common law, independent of any statute, it is essential to the validity of a policy obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life insured. A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is innocent wagers, are at common law valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong? Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against. In respect to insurances against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void, even at common law. It was so held in England, at an early day, by Lord Chancellor King, in Lynch v. Dalzell (4 Bro. P. C. 431), and by Lord Hardwicke in Saddlers' Company v. Badcock (2 Atk. 554); and the courts in this country have generally acquiesced in and approved of the doctrine. In this State such policies would fall under the condemnation of our statute, avoiding all wagers and gambling contracts of every sort; but they would, no doubt, also be held void, independently of that statute, at common law. * * * In regard, however, to marine insurances, a different rule seems to have prevailed in England. * * * The distinction between these two classes of policies is, in my view, a mere matter of accident, and grew out of the peculiar manner in which the question was presented in respect to marine policies." After referring to various cases, Judge Selden continues, "It was in this indirect way that the doctrine in question, as to marine policies, first crept into the law. It was important to show this, because the effect of what I consider as the inadvertence of the court in Depaba v. Ludlow (Comyns, 361), was not confined to policies upon ships. It must have been, I think, in consequence of the doctrine initiated by that case, that it came to be understood in England that, in insurances upon lives, it was not necessary at common law that the party to be benefited by the policy should have any interest in the life insured. There may not have been any direct decision to that effect; yet, that such was the prevalent impression, is to be inferred from the enactment of the statute. * * * That impression does not appear to be supported by any adjudged case. Life insurance seems not to have been practiced to a great extent in England until a comparatively modern date, and the probability is, that as soon as such insurances became frequent, the evils of gambling in them were so apparent that Parliament interposed upon the assumption that the same rule would be applied to them as to insurances upon ships. I cannot regard that act as affording any very strong evidence, that at common law, wagering policies upon lives were valid. It seems to me, that, were the naked question presented whether such a policy comes within the admitted exception to the validity of wagers in general, that is, whether it is repugnant to a sound public policy, no court, not hampered by some unfortunate or mistaken precedent, would hesitate for a moment in holding the affirmative. In Massachusetts, in Vermont, in Pennsylvania, and I believe other States, it has been so held in regard to wager policies in general. But policies without interest, upon lives, are more pernicious and dangerous than any other class of wager policies; because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds. Chancellor Kent was evidently embarrassed by the position of this question in England. (3 Kent Com. 368.) * * * This obscure manner of treating the subject is plainly to be attributed to the reluctance of the

setts[1] and of Indiana[2] is to the same effect. In New Jersey, upon the other hand, it has been decided that such policies are not void at common law.[3] The cases in most of the other States seem to assume that an interest is necessary, the judges discussing the question whether, in point of fact, an interest existed in the case before them rather than whether it must exist to make the policy valid.

§ 10. **In England Pecuniary Interest Required.**—Under the English "Gambling Act" it seems always to have been held that the interest required must be a pecuniary one;[4] that it must be something more than a mere moral claim or obligation, more than a mere anxiety or solicitude about the life of the person, or a mere expectation of advantage from its continuance, however strong that expectation may be. The statute is held to contemplate some beneficial right, valuable in the eye of the law, the deprivation of which would occasion a pecuniary loss,[5] or as stated by Bunyon:[6] "An insurable interest must be pecuniary; no ties of blood or affection are sufficient. The interest must arise out of some one subsisting right of property which may be prejudicially affected by the occurrence of the event assured against, and which, whether in possession, in reversion, or contingent, would give the assured a standing in a court of equity, if the title were in question."

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learned author to admit (notwithstanding the impression that appears to have obtained in England), that gambling in life insurance could be tolerated at common law. That impression has been here traced, as I think with justice, to the very questionable doctrine of the English courts in regard to marine policies. It has never, that I am aware of, been recognized and adopted by any American court, and is so obviously repugnant to the plainest principles of public policy, that it is somewhat surprising that it should ever have existed. My conclusion, therefore, is, that the statute of 14 George III, avoiding wager policies upon lives, was simply declaratory of the common law, and that all such policies would have been void, independently of that act."

[1] Lord v. Dall, 12 Mass. 115. But see Loomis v. Eagle L. & Health Ins. Co. 6 Gray, 396.

[2] Franklin L. Ins. Co. v. Hazzard, 2 Ins. Law Jour. 180.

[3] Trenton Mut. L. & F. Ins. Co. v. Johnson, 4 Zab. 576; and the Supreme Court of Rhode Island seems inclined to the same view, Mowry v. Home L. Ins. Co. 9 R. I. 346.

[4] Halford v. Kymer, 10 B. & C. 724; Hebdon v. West, 3 B. & S. 578, 589.

[5] Dowdeswell, Law of Life & Fire Ins. 19.

[6] Bunyon, 14.

A parent, as such, has in England no insurable interest in the life of his child. Thus, in Halford v. Kymer,[1] it appeared that upon the marriage of the plaintiff certain funds had been settled after the decease of himself and his wife, who were successively entitled to a life interest, upon trust for the children of the marriage, according to the appointment of the plaintiff and his wife; and in default of appointment if there should be but one child of the marriage, then in trust for such child, to become a vested interest in such child, if a son, at the age of twenty-one years; and if no child of the said marriage, or issue of such child should become entitled to a vested interest in the said trust moneys, then upon such trust as the wife should appoint, and in default of her appointment, in trust for her next of kin, as if she had died intestate and unmarried. They had one son and no other children; and the marriage having been dissolved by act of Parliament, the plaintiff married again, and effected the policy in question on Feb. 13, 1826, for two years, upon the life of his son, to provide against his death before he attained the age of twenty-one years. The son did attain that age on June 2d, 1827, and on the 5th of January following made his will, and thereby gave all his real and personal estate to his father, and appointed him sole executor, and died on the 11th of the same month. In an action against the company, Lord Tenterden nonsuited the plaintiff, on the ground that, not having any pecuniary interest in the life of his son at the time when he effected the policy, the same was void under the statute; giving him liberty to move to enter a verdict if the court should be of opinion that he had an insurable interest. In delivering the judgment of the court, Baily, J., said: "It is enacted by the third section of the 14th Geo. III, ch. 48, 'that no greater sum shall be recovered than the amount of the value of the interest of the insured in the life or lives.' Now, what was the amount or value of the interest of the party insuring in this case? Not

[1] 10 B. & C. 724.

one farthing certainly. It has been said that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life in his (the son's) name, not for his (the father's) own benefit, but for the benefit of his son, there is no law to prevent his doing so; but that is a transaction quite different to the present, and if a notion prevails that such an insurance as the one in question is valid, the sooner it is corrected the better." In the argument upon this case it was urged that by the statute of Elizabeth, a father falling into poverty in his old age was entitled to a maintenance by a son, if able to support him, and that the maintenance which the parish must give, may be much less than that which a son would be ordered to pay. But this argument did not vary the decision, the court saying the parish is bound to maintain him, and it is indifferent to him whether he be maintained by the parish or his son. They refer to the earlier unreported case of Innes v. Equitable Assurance Co.,[1] where a policy had been effected by a father on his daughter's life, and it was assumed to be essential to prove a pecuniary interest.

§ 11. Lord Eldon, in an elaborate decision upon marine insurance, says in effect[2] that the mere chance or expectancy which a person may have, as heir of another, will not give him an insurable interest in the life of the other, though the premature death of the latter might deprive the former of property which might otherwise devolve upon him, and it makes no difference that the ancestor is incapable, from idiocy or incurable insanity, of making a will or executing a conveyance, the heir has still nothing more than a bare expectation, which does not give him an insurable interest. He illustrates the question as follows: "Suppose A. to be possessed of a ship, limited to B. in case A. dies without issue; that A. has twenty children, the eldest of whom is

[1] See 4 Lond. Law Mag. 37?.

[2] Lucena v. Craufurd, 2 B. & P. N. R. 270, 324.

twenty years of age, and B. is ninety years of age; it is a moral certainty that B. will never come into possession; yet this is a clear interest. On the other hand, suppose the case of the heir-at-law of a man who has an estate worth £20,000 per annum, who is ninety years of age, upon his death-bed, intestate, and incapable from incurable lunacy of making a will. There is no man who will deny that such an heir-at-law has a moral certainty of succeeding to the estate; yet the law will not allow that he has any interest, or anything more than a mere expectation."

§ 12. **Interest Implied from Relationship.**—Certain relationships have, however, apparently been held, under the English law, to imply an insurable interest. Thus Lord Kenyon held that it must be presumed that every wife has an insurable interest in the life of her husband.[1] It has been said[2] that the contrary is not true, and that a husband has not an insurable interest in the life of his wife, but in Hebdon v. West,[3] Justice Wightman seems to agree that such an interest does exist in the life of the wife, though he suggests the somewhat singular reason for it that "the husband is bound to find his wife necessaries;" in other words, the husband, being under obligation to pay money for his wife, thereby acquires an interest to enable him to insure against the event which will relieve him of that obligation. Where the life of a pauper dependent upon his son for support was insured, it was held that the son had not an interest in the father's life within the meaning of the statute. He will not be allowed to enter into "a speculation on the father's life and limbs."[4]

Though there is some difficulty in reconciling the principles upon which the different cases are decided, it is probable

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[1] Reed v. Royal Exchange Ass. Co. Peake, Add. Cas. 70.

[2] Bunyon, 14.

[3] 3 B. & S. 579; s. c. 9 Jur. N. S. 747; 32 L. J. Q. B. 85; 11 W. R. 422; 7 L. T. N. S. 854. It seems to be held in Scotland that a husband may insure his wife's life. Wright v. Brown, 11 Ct. of Sess. Cas. 2d series, 459.

[4] Shilling v. Accidental Death Ins. Co. 27 Law Jour. Exch. 16, 19. *Post*, § 17 note.

that the true rule in England is that where a policy is sought to be supported by an interest derived from relationship, the person obtaining the policy must have a legal claim for support upon the person whose life is insured.

§ 13. **Creditor has Interest in Debtor's Life.**—As to the nature of the pecuniary interest which is necessary under the English statute, it is always admitted that a creditor has such an interest in his debtor's life,[1] and yet if the same principles are applied to the consideration of a creditor's interest as to those of an heir, it is difficult to uphold this doctrine as a universal rule. The debtor may be a pauper, crippled and bedridden, with no possibility of ever paying the debt; or the creditor may have abundant other security for his debt, so that it will really make no difference to him whether the debtor lives or dies. Though considerations of this kind are presented by various writers,[2] and the point was taken in one early case before Lord Mansfield,[3] yet the rule that a creditor has an insurable interest in his debtor's life is too firmly settled to admit of doubt, but in England the question of the effect of his having other security is perhaps an open one.[4]

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[1] Lindenau v. Desborough, 3 C. & P. 353; s. c. on motion for new trial, 8 B. & C. 586; Anderson v. Edie, Nisi Prius, 1795, cited 2 Park on Ins. 915; 2 Marshall on Ins. 776. The law of Scotland is to same effect: Lindsay v. Barmcotte, 13 Ct. of Sess. Cas. 2d series, 718.

[2] Ellis on Insurance, 136; London Law Mag. vol. 22, N. S. 347, 362; *post*, § 23.

[3] Assignees of Davis v. Brown, Weskett on Ins. 338.

[4] In referring to Anderson v. Edie, Marshall, *ubi supra*, says: "An insurance was made on the life of Lord Newhaven, from the 1st of December, 1792, to the 1st of December, 1793. In an action on the policy, the only question was as to the plaintiff's interest in the life insured, which, it was contended, was not sufficient to take this case out of the above statute. It appeared in evidence that Lord Newhaven was indebted to the plaintiff and a Mr. Mitchell, in a large sum of money, part of which debt had been assigned by them to another person; the remainder being more than the amount of the sum insured, was upon a settlement of accounts between the plaintiff and Mitchell, agreed by them to remain to the account of Mitchell only. Lord Kenyon, who tried the cause, was of opinion that this debt was a sufficient interest. He said it was singular that this question had never been directly decided before; that a creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied might materially depend upon it; and that, at all events, the death must, in all cases, in some degree, lessen the security. The jury found a verdict for the plaintiff.

"From the above note of this case, though it seems to be a defective one, it may

A note given for a debt contracted during the minority of the debtor is sufficient to give an insurable interest, for though the interest is contingent, still the infant might, or might not, avoid the note, and till so avoided, it must, as against a third person, be taken as good; for only the infant could take the objection that it was void.[1] So where one, expecting that a lady would devise property to him, agreed to assign that property, when received, to a third person; it was held that the latter would have an insurable interest in the life of the expectant devisee. The third person paid a consideration to the expectant devisee at the time of the agreement; but the latter agreed to repay it, though without interest, if he did not so convey the property within a fixed period after the death of the lady. Counsel claimed that it was an insurance upon the life of the lady, but Lord Campbell held, that though the contract might

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reasonably be supposed that the plaintiff had only Lord Newhaven's personal security for the debt, and that with him died all hopes of repayment from his estate. Upon this ground I think there could be no doubt but that the creditor had an insurable interest in Lord Newhaven's life to the amount of the debt. But Lord Kenyon is stated to have said that, 'At all events, the death must, in all cases, in some degree, lessen the security.' As an abstract proposition, this is, in general, true. But it cannot be inferred from this that his lordship meant to lay it down as law, that every creditor, however his debt may be secured, has an insurable interest in the life of his debtor to the amount of the debt. Lord Mansfield, in the case of Stackpool v. Simon (2 Park on Ins. 932), says that a policy may be considered as a collateral security for the debt due to the insured. And yet it would seem that, even where the creditor has only the personal security of the debtor to rely upon for repayment, the insurer, before he pays the sum insured, might, perhaps, have a right to call upon the insured to show that nothing could be recovered from the estate of the deceased debtor. Where the debt is amply and satisfactorily secured by mortgage or otherwise, the creditor can have but the shadow of an interest in the life of the debtor. But, by the third section of the above (Gambling) Act, it is declared that, '*No greater sum shall be recovered from the insurer than the amount or value of the interest of the insured in the life insured.*' Now, what can be the *amount or value* of the interest of the creditor in the case put? Surely nothing that a jury could estimate."

Ellis, in referring to the same case (Ellis on Insurance, 136), says: "It may be observed that this note is very short and not very satisfactory, because, if the plaintiff had in fact assigned over his interest in the debt to Mitchell before the death of the assured, it is difficult to see how any insurable interest within the statute remained in him, unless we assume that the debt still remained legally due and recoverable by the plaintiff from Lord Newhaven, the latter having no notice of the assignment of the debt in such settlement of accounts, or upon the principle of Tidswell v. Ankerstein (Peake, 151), we consider the plaintiff to be in the situation of a trustee."

[1] Dwyer v. Edie, cited Park on Ins. 914, and 2 Marshall on Ins. 778.

resemble an insurance upon her life, because there was an advance of money for a benefit to be received upon her death, yet that there were circumstances about it which were not incidents to life insurance, the death of the lady being made important only for the purpose of ascertaining whether there was or was not the expected devise. Still he held, that if it were correctly called an insurance upon life, it was not without an interest within the meaning of the statute; for, although the expectant devisee had no vested interest in the property of the lady which he could sell, still a promise to assign a devise which he expected, would be a sufficient consideration for a promise to pay for it in a contract not under seal, and the purchaser of such an expected devise would have an interest so far as to prevent his policy from being considered the gaming or wagering prohibited by the statute.[1]

§ 14. **Executor's Interest.**—An executor or trustee has an insurable interest in respect of the legal right or interest vested in him. Thus where an insurance was made for one year on the life of a person who had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to the insurance, having made the plaintiff executor of his will and directed him to make insurance, it was objected in an action brought by the

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[1] Cook v. Field, 15 Q. B. 460; s. c. 14 Jur. 951; 19 L. J. Q. B. 441. Mr. Bunyon says, with reference to this case (p. 18): "The doctrine in this case is not perhaps very obvious, as it might be thought the purchaser could not be in a different position to that of his vendor in respect of his interest; and this undoubtedly would be the case as regards the property; but it appeared that the contract itself, being one that the law would recognize, became an insurable interest in the purchaser, so as to entitle him to secure himself by insurance against the contingency of the death of the proposed testator, without having made the devise; a principle which may be illustrated by the rule of courts of equity, as laid down in an early case (Dursley v. Fitzhardinge, 6 Ves. 261), as to the interest required to give a standing therein, as, for instance, to perpetuate testimony, namely, that although the next of kin or heir apparent of a lunatic intestate could not file a bill, yet that they might respectively enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate; that the law would frame an interest in respect of the contract, and with reference to that they would have a right to perpetuate testimony, although they could not qualify themselves as to any interest in the subject itself."

executor, that, as the annuity was not devised to him by the grantee, he had no insurable interest in the life of the grantor, but that the real interest was in the person to whom the annuity was bequeathed. But Lord Kenyon thought this a sufficient interest in the executor to support the action.[1] But any money paid by the insurers on a policy procured by a trustee, will be clothed with a trust in his hands subject to any equitable lien he may have for premiums paid from his own funds.[2] Any vested interest, though subject to a power of revocation, will afford an insurable interest.[3] A tenant of property or of an annuity during the life of another has clearly an interest in that other's life.[4] A manager has an interest in the life of an actor whom he has engaged.[5]

§ 15. **Debt must be Lawful.**—A note given for money illegally won at play does not give an insurable interest.[6]

§ 16. **Contingent Interest Sufficient.**—In one case[7] it appeared that the plaintiff was entitled under a will, in right of his wife, to an interest in personal property which was not capable of being reduced to possession. He and his wife assigned to the defendant this interest, as security for a debt due from the husband, and the defendant, without the knowledge of the debtor or his wife, insured the wife's life. She died without the property having been reduced to possession, and the creditor received the insurance money. The debtor then sought to redeem and to be allowed the benefit of the money received from the insurance company. It was held, among other things, that the creditor had a sufficient interest to support the insurance. "The event,

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[1] Tidswell v. Ankerstein, Peake, N. P. 151.

[2] Bunyon, 20, citing *Ex parte* Andrews, 1 Madd. 573; Armitage v. Winterbottom, 1 M. & G. 130; Holland v. Smith, 6 Esp. 11; Clay v. Harrison, 10 B. & C. 99.

[3] Bunyon, 20.

[4] 22 London Law Mag. N. S. 347; Parsons v. Bignold, 13 Sim. 518; Phillips v. Eastwood, Ll. & G. Cas. *temp.* Sugd. 289.

[5] London Law Mag. *ubi supra.*

[6] Dwyer v. Edie, cited Park on Ins. 914; 2 Marshall on Ins. 778.

[7] Henson v. Blackwell, 4 Hare, 434.

against the consequences of which it was his interest to guard, was the death of the husband, leaving the wife surviving. In that event the defendant might have lost the benefit of his security on the mortgaged property and the debt for which it was given. If that event had happened, and the insurance had been on the life of the husband, the same event which took away his security, would have entitled him to the payment of the policy. If the same event had happened, the insurance on the life of the wife would have been the only remaining security for the debt in case of the husband's insolvency. The defendant therefore had, I think, an insurable interest in the life of the plaintiff's wife; he had a right to a guaranty against the consequences of her surviving the plaintiff." But the court held that the interest ceased on her death in her husband's life time, and that, therefore, the insurance company need not have paid the money, but having paid in their own wrong the debtor had no claim to it.[1]

§ 17. **Interest in One's Own Life sufficient, but not to be Used as a Cover.**—Every man is conclusively presumed to possess an insurable interest in his own life, and that interest is unlimited in amount.[2] It extends to every portion of his life, and,

[1] Mr. Bunyon says of this case (p. 290): "It is difficult to discover the insurable interest possessed by the mortgagee in the life of the lady. The risk consisted in her living, not in her dying; and although the Vice-Chancellor remarked, that in the event of her surviving her husband, the policy would be the only security for the debt, this remark would have been equally applicable to a policy effected upon the life of any other person, although an entire stranger to the mortgage transaction; or, to speak more correctly, the policy in such a case would not be a security for the debt at all, any more than the defendant's own balance at his bankers could be so. The lady would not be his debtor, neither would he possess any property dependent upon her life; from whence then could his insurable interest arise? and in what manner could the policy become impressed with the character of a security? The risk to be insured against was evidently the contingency of the death of the husband before that of his wife, without having been able to reduce the share of the legacy into possession. Perhaps the explanation of the expressions of the Vice-Chancellor may be that they were not intended to do more than enunciate that the court will refer the policy to the insurable interest, and if it finds that interest bound by a trust, will not allow the trustee a pecuniary benefit derived from his fiduciary character."

[2] Wainewright v. Bland, 1 Mood. & Rob. 481; s. c. 1 Tyrwh. & Gr. 417; 1 M. & W. 32.

therefore, an executor suing on a policy effected by his testator for two years of his life, is not bound to show a special reason for an insurance limited to that period.[1] But this interest, which every man has in his own life, cannot be availed of to cover a mere formal evasion of the statute. Thus, in a case where a person induced another in whose life he had no interest, to insure it nominally for his own benefit, but the first person paid the premium, intending, by assignment or otherwise, to get the benefit of the policy, so that it was substantially his policy, the opinion was expressed by Lord Abinger (though the point was not decided, except at *nisi prius*) that it was a fraudulent evasion of the statute.[2] In a subsequent case it was held[3] that, though where the insurance is really effected by the party insured, the mere circumstance that another party pays the premium may not be conclusive, or even *per se* sufficient, to warrant a jury in finding that the interest was not in the assured; yet where insurance is effected by the party nominally insured, at the instance and for the benefit of another who is to pay the premiums, and in pursuance of an agreement between them, under which he immediately secures, by assignment or bequest, the sole benefit of the policy, the evidence will be so conclusive that the interest is really in the third party (so that, under the English statute, the policy is void for not having been in his name), that the court will set aside a verdict for the plaintiff in an action brought by him upon it. In this case a pauper nominally insured his life for a

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[1] Wainewright v. Bland, *ubi supra.*

[2] *Ibid.* But see Hebdon v. West, 3 B. & S. 579; s. c. 9 Jur. N. S. 747; 32 L. J. Q. B. 85; 11 W. R. 422; 7 L. T. N. S. 854. Mr. Ellis says (Ellis on Insurance, 133), referring to Wainewright v. Bland: "Such an insurance would seem to fall within the letter of the first and second sections of the statute, but not so clearly within its intention, as the insurance is the act of the party effecting it; the more particular object of the statute appears to be to restrict wagering or speculative policies by third persons having no interest. It may also be remarked, that as a party insuring for himself has at the time clearly an interest in his own life, there seems to be no reason why he should not give or convey the benefit of that interest to another."

[3] Shilling v. Accidental Death Ins. Co. 27 L. J. Exch. 16. A demurrer to the plea in this case is to be found in 2 H. & N. 42 and 26 L. J. Exch. 266; and a subsequent trial in 1 F. & F. 116. The demurrer was founded upon that section of the statute which re-

large sum, but it was at the instigation of his son. In an Irish case,[1] where, though the statute did not apply, it was one of the conditions of the policy that "the insurer should have an interest in the life of the assured," it was held that procuring a person to effect an insurance on his life and then to assign it to a third party who had no interest, was an evasion of the conditions of the policy, and that one seeking to recover on it, was bound to show that the assignment was one which he was entitled to uphold in a court of equity. In Prince of Wales Assurance Co. v. Palmer,[2] a policy taken by a man on his own life and assigned to a brother was held to be really the policy of the latter, in which the former never had any real interest, it having been obtained as a part of a plan for defrauding the insurance companies. One brother murdered the other. The court say, "The mode of accomplishing it was by effecting insurances upon the lives of persons who were, in a great measure, under his control, and then, by precipitating by his own act, the period at which those insurances were to become claims upon the insurance companies."

These cases may be considered as deciding, under the Gambling Act, that, although where the insurance is nominally obtained by a person on his own life, the policy is

quires the name of the person interested to be stated in the policy. The demurrer was sustained, and Bramwell, B., referring to it in 27 Law Jour. Exch. 16, says, "What the plaintiff argued on the demurrer and what the court assented to was this: that if in reality the insurance was the father's, without any private bargain between him and the son, then it mattered not that the plaintiff borrowed the premiums." In the report in 27 Law Jour. 16, counsel *arguendo* say, "Suppose a wife get her husband to insure his life and out of her separate income pays the premiums?" and Pollock, C. B., answers, "If he were incapable of earning anything, so that his life had no pecuniary value, such an insurance would be highly suspicious." Mr. Lush *arguendo* in 2 H. & N. 42, says, "It is consistent with this plea that there was an understanding between Thomas, the son, and James Shilling, his father, that as the father's occupation was a hazardous one he should insure his life and the son should pay the premiums, and that the father should leave the sum insured to the son by his will," and a majority of the judges agreed that if such were the facts the plea would not be proven, and that the policy would, in effect, be the policy of the father. On the second trial it was left to the jury to say whether the insurance was not in effect the same as if it had been effected by the son in his own name on his father's life. They found that it was so, and rendered a verdict for the defendant.

[1] Scott v. Roose, Long. & Towns. 54; s. c. 3 Ir. Eq. R. 170.

[2] 25 Beav. 605.

prima facie valid, yet it may be shown that it was really obtained by a third person, and is therefore void, because there was in fact no insurable interest in the third person, and also because the name of the person interested does not appear in the policy as that act requires.[1] In the former point of view the decisions are applicable in this country.

§ 18. **Amount of Interest.**—With reference to the amount of interest, it was decided by Lord Ellenborough, in Godsall v. Boldero,[2] in 1807, that only such amount could be recovered as was shown to be due at the time the action was brought, the contract of life insurance being, he said, one of indemnity. This case, after leading to many erroneous decisions, was finally overruled, in 1854, by the Exchequer Chamber, in Dalby v. The India & London Life Assurance Co.,[3] and the decision was arrived at that the interest existing at the time the policy was issued is the measure of the recovery, though after the issue of the policy, and before the death, the interest may have actually ceased.[4] In the subsequent case of Hebdon v. West, this doctrine was applied where two policies had been issued to secure the same interest.[5] In that case the plaintiff, who had been for many years a clerk in an unincorporated bank, had incurred a considerable debt to the bank. It had been proposed to make him a partner, but instead of so doing his salary was increased from £200 to £600 a year; and it was agreed by Pedder, the managing partner, that such increase should continue for seven years. Pedder also promised him, that so long as he, Pedder, lived, the plaintiff should not be called upon to pay his debt. For the purpose of protecting himself in case of

[1] As to the American rule, see *post*, § 23.

[2] 9 East, 72.

[3] 15 C. B. 365; s. c. 3 C. L. R. 61; 18 Jur. 1024; 24 L. J. C. P. 2; 28 Eng. Law & Eq. 312.

[4] The fallacy of the reasoning in Godsall v. Boldero is shown in De Morgan's Essay on Probabilities (p. 244), cited with approbation in Hebdon v. West, 3 B. & S. 579. A writer, London Law Mag. vol. 53, N. S. 347, shows in detail the effect which the erroneous decision referred to had upon a series of subsequent cases.

[5] 3 B. & S. 579; s. c. 9 Jur. N. S. 747; 32 L. J. Q. B. 85; 11 W. R. 422; 7 L. T. N. S. 854.

Pedder's death, the plaintiff, with his consent, insured Pedder's life for £5,000, and subsequently, when the debt to the bank had increased, he obtained with like consent a second policy for £2,500 more. After Pedder's death the bank stopped payment, and the plaintiff, having received the £5,000 on the first policy, applied it on his debt to the bank. He then brought suit on the second policy, but it was held that the promise of Pedder not to call upon him for his debt did not give him an insurable interest in Pedder's life, for the reason that the promise "was without any consideration, or any circumstances to make such a promise in any way binding;" and it could not therefore "be considered as a pecuniary, or indeed an appreciable interest in the life." But on the other hand, it was held that the promise to pay the increased salary for seven years, did give the plaintiff an insurable interest in the life of Pedder; for "it might happen that Pedder, one of the joint contractors, was the only one who could pay the salary, or the plaintiff might be interested in all the joint contractors being alive." The second policy was therefore held to have been valid at its inception "to the extent at least of so much of the period of seven years as would remain at the time the policy was effected, which appears to have been about five years. This, at the rate of £600 per annum, would give the plaintiff a pecuniary interest in the life of Pedder to the extent of £3,000;" and the second policy, being for £2,500, could have been collected in full had it not been for the provision of the Gambling Act, which forbade a recovery of more than the interest shown to have existed at the time the policy was issued. The court say: "We are of opinion that, though upon a life policy the insurable interest at the time of making the policy, and not the interest at the time of the death, is to be considered, it was intended by the third section of the act that the insured should in no case recover or receive from the insurers (whether upon one policy or many) more than the insurable interest which the person making the insurance had at the time he insured the life."

By reason of that provision there could be no recovery of the second policy, for the payment of the £5,000 on the first policy had more than satisfied the insurable interest shown to have existed.

§ 19. But where a father had purchased from his son a contingent legacy of £3,000, which was payable to him if he attained the age of thirty years; and afterwards, when the son wanted twenty months of attaining the required age, the father applied to an insurance company to effect an insurance, and was told by them that, according to their usage, he must insure for two years, which he accordingly did, and the son died after the twenty months and during the continuance of the two years, it was held that he might recover the whole sum insured, though he had previously received the legacy, and though it was obvious that, at the time of obtaining the insurance, his interest was limited to a less period than the duration of the policy.[1]

§ 20. **American Law as to Interest.**—The English Gambling Act has never been regarded as applicable in this country.[2] So far, therefore, as it introduced any change in the common law, it rendered the law of England different from our own. Some of the States have, however, passed laws more or less resembling that of England. New York has a statute which makes wager policies illegal,[3] but it is less stringent in its terms than the statute of George.[4] In New Jersey it has been judicially held that no law exists against wager policies.[5] No State has by statute adopted

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[1] Law v. Lond. Indisp. L. P. Co. 1 Kay & J. 223.

[2] Loomis v. Eagle L. & Health Ins. Co. 6 Gray, 396, 402.

[3] This statute is as follows: "All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot or chance, casualty or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money, or property, or thing in action, so wagered, bet or staked, shall be void;" but the provision "shall not be extended so as to prohibit, or in any way affect, any insurances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law." 1 R. S. 662.

[4] Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith, 268, 291.

[5] Trenton Mut. L. & F. Ins. Co. v. Johnson, 4 Zab. 576. See *ante*, § 9.

that provision of the English statute which requires that the name of the person interested in the policy shall be stated in it;[1] nor the other provision that only the amount of insurable interest shown to have been possessed at the time the policy was issued can be recovered, though some of the earlier American decisions treat the latter as the law.

§ 21. **Pecuniary Interest not Essential.**—The American law upon the subject of the interest required to support a policy, is much less rigid than that of England. While there is no doubt that any interest which the courts of England recognize as sufficient, would be held good here, our courts admit the existence of an insurable interest in a very large class of cases where the English courts wholly deny it. Not only are contingent interests held to give an insurable interest, but many relationships give or imply such an interest here which would not be regarded for a moment in England. The tendency of the American decisions, especially the more recent ones, is to hold that wherever there is any well-founded expectation of or claim to any advantage to be derived from the continuance of a life, there is an insurable interest in that life, though there may be no claim upon the person whose life is insured that can be recognized in law or in equity. In the earliest American case of life insurance,[2] decided in 1815, the plaintiff, a young woman without property, was, and had been for several years, supported and educated at the expense of her brother. The court considered that "Nothing could show a stronger affection of a brother towards his sister than that he should be willing to give so large a sum to secure her against the contingency of his death, which would otherwise have left her in absolute want. * * In common understanding no one would hesitate to say that in the life of such a brother the sister had an interest. * * But it is said the interest must be a pecuniary, legal interest,

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[1] *Ante*, § 17. Hodson v. Observer L. Ass. Soc. 8 E. & B. 40; Dawker v. Canada L. Ass. Co. 24 Upper Canada Q. B. 591; Evans v. Bignold, 20 L. T. N. S. 659.

[2] Lord v. Dall, 12 Mass. 115. This decision is expressly approved by Chancellor Walworth in Leonard v. Eagle L. & Health Ins. Co. 4 Livingston's U. S. Law Mag. 286.

to make the contract valid; one that can be noticed and protected by the law, such as the interest which a creditor has in the life of his debtor, a child in that of his parent, &c. The former case, indeed, of the creditor, would have no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned, although much more should be secured than the legal interest which the child had in the protection of his father. Indeed we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it."

§ 22. **Reasonable Prospect of Advantage Sufficient.** It is held in New Jersey[1] that the interest required need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured, and that there is a sufficient interest if an indirect advantage may result to the plaintiff from the continuance of the life; while in an elaborate decision in Massachusetts,[2] the court say, all that is necessary "to take the case out of the objection of being a wager policy is, that the insured has some interest in the life of the *cestui que vie;* that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage and advantage in life will be impaired, so that the real purpose is not a wager, but to secure such advantages supposed to depend upon the life of another. * * We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent, not

[1] Trenton Mutual L. & F. Ins. Co. v. Johnson, 4 Zab. 576.
[2] Loomis v. Eagle L. & Health Ins. Co. 6 Gray, 396.

merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection." But in the subsequent case of Forbes v. American Mutual Life Insurance Co.,[1] the same court say: "The question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given. It was fully discussed and considered in the recent case of Loomis v. Eagle Life & Health Ins. Co., and it is there said by the chief justice of this court that 'perhaps it would be difficult to lay down any general rule as to the nature and amount of interest which the assured must have.' As the premium is intended to be a precise equivalent for the risk taken, it would seem that the contract is a just and equitable one, whether any interest in the life exists or not; and that the only essential inquiry is, whether the object of the contract is such as to obviate the objections to a mere wager upon the chances of human life. In this case the policy was procured by Thomas T. Smith upon his own life, and the first payment of the premium upon it was made by him. It was made payable to the plaintiff, the husband of his sister, and the subsequent payments were made by the plaintiff as his agent; but the promise of the company is to and with Smith. The policy appears to have been really, if not nominally, for the benefit of Smith, and the interest of the plaintiff to be simply that of a trustee. Under such circumstances we think no question could have arisen as to the sufficiency of the interest, unless on account of the conditions of insurance annexed to the policy, by one of which it is stipulated that 'policies made payable to creditors, or persons not belonging to the family of the person whose life is insured, are subject to proof of interest, and the company

[1] 15 Gray, 249.

will pay upon such policies no greater sum than the amount or value of such interest,' unless a waiver of such proof is indorsed upon the policy. But while we are inclined to the opinion that even under this condition the plaintiff would be entitled to recover, we are relieved from the necessity of considering the point by the decisive fact that no such issue is raised by the pleadings."

§ 23. In New York it has been held[1] that it is not necessary that one for whose benefit the life of another is insured should be a creditor of that other. It is enough that, in the ordinary course of events, pecuniary loss or disadvantage will naturally or may probably arise to the party in whose favor the policy is written, from the death of the person whose life is insured; while in another New York case[2] Judge Woodruff, now of the United States Circuit Court, says: "I should be disposed, I think, to go further and say, that under our statute,[3] an insurance made in good faith would be valid upon a life when there was reasonable expectation or high probability of gain from its continuance, or of loss from the death." He remarks also: "Nor is it necessary that the benefit should be inevitable or certain to result from the continuance of the life. It is not *certain* that a debtor will pay the debt due to his creditor, however long he may live, and yet his creditor has an insurable interest, founded on his title to such payment out of the acquisitions of such debtor, and the earnings of his future life. * * And, upon the same principles, where one has advanced money upon the faith of another's executory contract to render him any pecuniary advantage in the future, which death will render impossible, the former may insure the life of the latter, for the purpose of an indemnity against loss, not because it is absolutely *certain* that such advantage will be derived from the continuance of the life (since the party whose life is insured may violate his contract, or other contingencies

[1] Hoyt v. N. Y. L. Ins. Co. 3 Bosw. 440.

[2] Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith, 268. [3] *Ante*, § 20.

may prevent his performance), but because he has a title to that performance and the resulting pecuniary advantage, which is wholly defeated by the happening of the contingency insured against. It is not intended to intimate that an equitable title or interest may not also be protected by such an insurance. I have no doubt it may be. * * It is urged that it in no wise appears that the efforts of R. H. Miller would have produced any pecuniary benefit to the plaintiff. So it may be said to a wife, *non constat*, that your husband will support you if he live. Or to the creditor, *non constat*, that your debtor would have been either able or willing to pay you, had he lived. Or to a master, *non constat*, but that the labor of your apprentice would have been unproductive, or but that infirmity or vice in him would have made a continuance of the relation a burden to you instead of a profit. The law does not proceed upon any such speculation as to possible results. There is a legal presumption of benefit in all these cases, because there is a claim to what is in its nature beneficial. There is, in like manner, a legal presumption of loss from the death, against which the party may properly seek indemnity; because death destroys the claim to the presumptive benefit, or renders its attainment impossible. * * Doubtless, even where a relation subsists between the assured and him whose life is the subject of the insurance similar to that exhibited in the present case, the insurance may yet be made to an amount so grossly disproportioned to the probable or possible benefit resulting to the assured from the continuance of the life, as to be deemed an evasion of the statute, or a mere cover for a wager, and in such case the contract may be wholly void. * * Where it appears that the policy in question is made in good faith for the indemnity or security of the party assured, and is therefore valid under our law, I perceive no rational objection to the view, that when it appears that the insurance was designed to guard against a loss, or to secure interests of uncertain amounts, which, though they might be less, might also greatly exceed the sum insured, and depending upon contin-

gencies, the effect of which is not from their nature susceptible of proof, the sum insured is to be deemed the indemnity intended by the parties. * * An insurance on one's own life is recoverable to any amount, because the interest of the assured is presumptively worth any value at which it may be insured. * * In my own opinion, all policies upon life should be treated as valued policies; and when the plaintiff has shown enough to bring his case within the exception in our statute, by proof that the insurance was made in good faith for his security or indemnity, he should be deemed (*prima facie* at least) entitled to recover the sum insured."

The Supreme Court of the United States has recently adopted the same views. It says,[1] "The better opinion is, that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui que vie*, are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured. Insurers in such a policy contract to pay a certain sum in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover, if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured, at the inception of the contract."

§ 24. **Relationship as implying Interest.**—In conformity with these general views it has been held that a sister has an insurable interest in the life of a brother who supported and edu-

[1] Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616; s. c. 1 Ins. Law Jour. 658.

cated her;[1] and that such an interest exists even where the sister is married and is in no respect dependent upon the brother, if he is unmarried and is without issue or parent living;[2] that a father has an interest in the life of his minor child,[3] though it has been said[4] that a father has no such interest in the life of a child of full age, but this may be doubted. A master having a legal title to the labor of his servant for a term of years has an insurable interest in the life of such servant, whether free[5] or slave.[6] So a partner in the life of a copartner.[7] But it has been held that a man has not an insurable interest in the life of his brother merely as such, though it would be different if he were dependent on him for support.[8] The same is true of a nephew's interest in the life of an uncle,[9] and the same has been said of the interest of a husband in his wife's life.[10]

§ 25. **Wife has Interest in Husband.**—A wife has an insurable interest in the life of her husband, both on the general principles already stated,[11] and by virtue of special statutes existing in most of the States. These statutes are nearly alike in their provisions and phraseology. They all of them allow a husband's life to be insured for the benefit of his wife and children, or both, and allow the premium to be paid from the husband's property, without permitting his creditors to derive any advantage from the insurance. In some States, as

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[1] Lord v. Dall, 12 Mass. 115.

[2] France v. Ætna L. Ins. Co. U. S. Circuit E. D. of Penn. 2 Ins. Law Jour. 657.

[3] Loomis v. Eagle L. & Health Co. 6 Gray, 396; Mitchell v. Union L. Ins. Co. 45 Me. 104. But see Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419; s. c. 1 Ins. Law Jour. 38; *post*, § 27.

[4] Mitchell v. Union L. Ins. Co. 45 Me. 104.

[5] Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith, 268, 292.

[6] Summers v. U. S. Ann. & Trust Co. 13 La. Ann. 504; Woodfin v. Asheville Mut. Ins. Co. 6 Jones' Law, 558.

[7] Valton v. Nat. Loan Fund L. Ass. Soc. 22 Barb. 9; s. c. 20 N. Y. 32.

[8] Lewis v. Phœnix Mut. L. Ins. Co. 39 Conn. 100; s. c. 3 Ins. Law Jour. 123.

[9] Mowry v. Home L. Ins. Co. 9 R. I. 346.

[10] Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419; s. c. 1 Ins. Law Jour. 38.

[11] See also St. John v. Am. Mut. L. Ins. Co. 2 Duer, 419, 429; s. c. 3 Kern. 31; Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283; Thompson v. Am. Tont. L. & F. Ins. Co. 46 N. Y. 674; Gambs v. Covenant Mut. L. Ins. Co. 50 Mo. 44; s. c. 2 Ins. Law Jour. 338; Succession of Hearing, La. 2d District of Orleans, MSS.

New York, the amount of annual premium which may be so taken is limited in amount, while in others, as in Massachusetts, it is only a question of good faith.[1] The effect of these statutes is to dispense with any proof of interest in cases coming under them, and also to protect from the claims of

[1] The New York statute, as it now stands, is as follows:

"SECTION 1. It shall be lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving such period or term, the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through or under him. But when the premium paid in any year, out of the property or funds of the husband, shall exceed $500, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of $500, but such excess, with the interest thereon, shall inure to the benefit of his creditors.

"§ 2. The amount of the insurance may be made payable, in the case of the death of the wife before the period at which it becomes due, to her husband, or to his, her or their children, for their use, as shall be provided in the policy of insurance, and to their guardian, if under age."

The statute of Massachusetts is as follows:

"A policy of insurance on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same, or his creditors. A trustee may be appointed by the party obtaining the policy, or if no such appointment is made, then by the Judge of the Probate Court for the county in which the party for whose benefit said policy is made resides, to hold the interest of the married woman in such policy, or the proceeds thereof. When a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of such other, or his representatives, or a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same. If the premium is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of his creditors.

"A policy of insurance on the life of any person, duly assigned, transferred or made payable to any married woman, or to any person in trust for her or for her benefit, whether such transfer be made by her husband or other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the same or his creditors; *provided however*, that if the premium on such policy is paid by any person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of said creditors, subject, however, to the statute of limitations."

It will be perceived that under the Massachusetts statute the person procuring the insurance need not be the husband of the woman who is to receive the money. It is also to be noted, that by a literal construction of the statute, no insurance could be made for the benefit of a married woman apart from her children. Some questions arising under these and similar statutes are considered in the Chapter on "Parties."

creditors of the husband the moneys received from the company.[1] A woman who is married to a man, but illegally, because he or she had a former wife living at the time, has an insurable interest in his life.[2] So a matrimonial engagement gives the woman an insurable interest in the man's life; for had he lived and violated the contract, she would have had her action for damages; had he survived and kept the same, then as his wife, she would have been entitled to support.[3]

§ 26. **Interest in one's own life sufficient if not used as cover.**—A person has undoubtedly an insurable interest in his own life,[4] and that interest supports a policy, whether he makes the loss payable to himself, his executors, or his assigns, or to a nominee or appointee named in the policy.[5] Nor is a policy obtained by one on his own life for the benefit of another, which latter advances the premium, necessarily[6] void. The

[1] Jacob v. Continent. L. Ins. Co. 1 Cincin. 519.

[2] Equitable L. Ass. Soc. v. Paterson, 41 Geo. 338. The decision in Holabird v. Atlantic Mut. L. Ins. Co. 2 Dillon, 166, *in notis*; s. c. 2 Ins. Law Jour. 588, apparently holds the contrary; but the case turned on a breach of warranty by the falsity of the statement in the application that she was the wife. In the Georgia case the court say: "We do not think such a policy comes within the reason of the law prohibiting gaming policies, nor that it is open to the other objection, that it offers inducements to crime. In this case, though the marriage was illegal, yet in fact the woman had an interest, and a deep interest, in the life of the husband. He treated her as his wife; he supported her as such; she passed in society as such, and she was dependent upon him for support as such. It was the husband who in fact effected this policy. It was his own method of extending to this woman his assistance and protection, after he should himself be dead. Here is no gaming, since the very person whose life is insured is himself the actor in the transaction. So, too, as to the temptation to crime, offered to the beneficiary of the policy. It would seem, when the person whose life is insured is himself the actor in the matter, the amount of temptation held out to others to take his life, may, as a general rule at least, be left to his discretion."

[3] Chisholm v. Nat. Capital L. Ins. Co. 52 Mo. 213; s. c. 2 Ins. Law Jour. 461.

[4] Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283; Campbell v. New England Mut. L. Ins. Co. 98 Mass. 381; Loomis v. Eagle L. & Health Ins. Co. 6 Gray, 396, 399; Valton v. National Loan Fund L. Ass. Soc. 22 Barb. 9; s. c. on appeal, 20 N. Y. 32; subsequent trial, 17 Abb. 268; Hogle v. Guardian L. Ins. Co. 6 Robertson, 567; s. c. 4 Abb. N. S. 346; Am. L. & Health Ins. Co. v. Robertshaw, 26 Penn. 189; Mitchell v. Union L. Ins. Co. 45 Me. 105; *ante*, § 17.

[5] Stevens v. Warren, 101 Mass. 564; Rawls v. Am. Mut. L. Ins. Co. 27 N. Y. 282; St. John v. Am. Mut. L. Ins. Co. 2 Duer, 419, 429; Lemon v. Phœnix Mut. L. Ins. Co. 38 Conn. 294; s. c. 1 Ins. Law Jour. 520; Provident L. Ins. & Inv. Co. v. Baum, 29 Ind. 236; Mallory v. Trav. Ins. Co. 47 N. Y. 52; s. c. 1 Ins. Law Jour. 840. Also cases cited in last note.

[6] Valton v. National Loan Fund L. Ass. Soc. 22 Barb. 9; Hogle v. Guardian L. Ins.

question is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager.[1] If the plaintiff and the insured confederate together to procure a policy for the plaintiff's benefit, when he is not and does not expect to be a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void.[2]

The Supreme Court of the United States has recently passed upon a case where, from the circumstances surrounding the transaction, they held that a policy procured by a man on his own life and assigned, was in effect a wager policy. The husband of the plaintiff, being in bad health, and indebted to the defendant in the sum of $70, at his suggestion insured his life for $3,000, under a seven years' policy. The policy was taken out by him under an agreement with the defendant, as was claimed by him, that he should pay the premiums for the seven years, and that in consideration of the payments and the debt to the defendant, the latter should in case of death during the life of the policy, receive two-thirds of the amount of the policy, and should pay one-third thereof to the wife and heirs. The defendant paid the premium for the first year, and at the same time took from the insured an assignment of the policy and his note, which was without consideration, for $3,000. The insured died before the expiration of the first year, and the defendant collected the $3,000 from the company and paid the appellee one-third of that sum, less the amount of the premium. The suit was brought by the plaintiff, the wife of the insured, as administratrix, to recover the remainder of the $3,000. There was some dispute as to the terms of the agreement under which the policy was taken out, but the court say: "If the transaction as set up by Cammack

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Co. 6 Robertson, 567; s. c. 4 Abb. N. S. 346; Campbell v. New England Mut. L. Ins. Co. 98 Mass. 381; *ante*, § 17.

[1] Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith, 568; Stevens v. Warren, 101 Mass. 564; Mowry v. Home L. Ins. Co. 9 R. I. 346.

[2] Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415. The remarks to the contrary in Cunningham v. Smith, 70 Penn. 450, were not necessary to the decision of that case.

be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for three thousand dollars to cover a debt of $70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him, deprives it of all pretence to be a *bona fide* effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get $2,000 out of the $3,000; nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception, probably to impose on the insurance company. Under these circumstances, we think that Cammack could, in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterward make on account of it, and that the assignment of the policy to him was only valid to that extent."[1]

§ 27. **What Pecuniary Interest Sufficient.**—With reference to the pecuniary interest necessary to uphold a policy, not only has a creditor an insurable interest in the life of his debtor,[2] but the creditor of a firm has an insurable interest in the life of each member of the firm, and each member of a firm has such interest in the life of every member of another firm which is its debtor. Each member of the debtor firm is individually liable for the whole debt, and each member of the creditor firm is interested in the whole debt,[3] and this is true though the partner whose life is not insured is perfectly solvent.[4] A contingent claim upon another, as a right to a share

[1] Cammack v. Lewis, 15 Wal. 643; s. c. 2 Ins. Law Jour. 679.

[2] Mitchell v. Union L. Ins. Co. 45 Me. 104; Lewis v. Phœnix Mut. L. Ins. Co. 39 Conn. 100; s. c. 3 Ins. Law Jour. 123.

[3] Rawls v. American L. Ins. Co. 36 Barb. 357; s. c. 27 N. Y. 282.

[4] Morrell v. Trenton Mut. L. & F. Ins. Co. 10 Cush. 282; Kennedy v. N. Y. L. Ins. Co. 10 La. Ann. 123.

in his earnings, gives an insurable interest in his life. This is illustrated in several cases which arose from what were known as California contracts. During the excitement consequent upon the discovery of gold in California, various arrangements were made, in the nature of quasi partnerships, according to which persons agreed to furnish means to enable others to go to California and dig gold, and were to be reimbursed by a share in the earnings of the gold diggers. These arrangements were sometimes individual ones between two persons, one of whom furnished the money, while the other went in pursuit of gold, and sometimes they took the form of an association with shares. Whatever form they took, they have always been held to give to the persons advancing money, an insurable interest in the lives of those going to dig gold.[1]

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[1] Leonard v. Eagle L. & Health Ins. Co. 4 Livingston's U. S. Law Mag. 286; Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith, 268; Morrell v. Trenton Mut. L. & F. Ins. Co. 10 Cush. 282; Bevin v. Conn. Mut. L. Ins. Co. 23 Conn. 244; Trenton Mut. L. & F. Ins. Co. v. Johnson, 4 Zab. 576; Hoyt v. N. Y. L. Ins. Co. 3 Bosw. 440; Mitchell v. Union L. Ins. Co. 45 Me. 104. In Loomis v. Eagle L. & Health Ins. Co. 6 Gray, 396, Chief Justice Shaw says, in a case where the gold digger was the plaintiff's son, "We understand that the law of Connecticut (where the parties resided) is similar to that of Massachusetts, and that by the law of both States, a father who supports, maintains and educates a son, under twenty-one years of age and not emancipated, is entitled to the earnings of such son, and may maintain an action for them. Here, when the father had in terms relinquished his right to a share in his son's earnings, for a valuable stipulation on the other side, designed and intended to increase those earnings, by a necessary implication he reserved his right to the other share of those earnings. According to any, the strictest, rule of construction, the assured in this case, we think, had a direct and pecuniary interest in the life of the *cestui que vie*, his son. It is argued, that the time which would remain after his probable arrival in California, before becoming of age, would be so short, that his earnings, if anything, would be very small. Supposing he was to have a passage of three or five months, he might still have five or six months to work in California; and this being a contract dealing with chances and probabilities, and even possibilities, and to be construed as such, it may well be supposed that the parties had it in contemplation that, by working a few weeks or days in a gold mine, or by a lucky hit in a single day, he might gain gold enough to make his share exceed the whole sum insured. But nearness or remoteness of this chance is immaterial; the parties regulate that matter for themselves, in fixing the sum to be insured, and the rate of premium. It seems to us therefore, that, according to the rule relied on by the defendants, the assured in the present case had a direct and pecuniary interest in the life of the son, sufficient to enable him to maintain this action. But, upon broader and larger grounds, we are of opinion that, independently of the fact that the son was a minor, and the assured had a pecuniary interest in his earnings, the assured had an insurable interest sufficient to maintain this action."

§ 28. Even if the debt is not legally collectable, it gives an insurable interest. Thus where the statute of limitations has barred the claim, the insurable interest is not extinguished.[1] In the case referred to, the statute had not barred the claim at the time the insurance was obtained, though it had done so before the death occurred and the insurance money became payable. The reason given for the decision, however, applies equally to either case. The statute of limitations, the court says, does not extinguish the debt, and the law still recognizes it, so far as to permit it to form a solid foundation and consideration for its own renewal by a new promise, and there, therefore, remains an insurable interest; and, indeed, without such promise the debt could be enforced by action, unless the defence of the statute was directly interposed. It would seem that it might also have been added that no one but the debtor can plead the statute of limitations, just as no one but the infant can plead his infancy.[2] It has been held in South Carolina, on a settlement of an estate after the death of an infant, and where the insurance companies had paid over the money, that where an infant took out a policy and assigned it to creditors as collateral security for a debt incurred for articles, not necessaries, the policy was valid in the creditor's hands, though the premium was paid by the creditor, but charged on his books to the infant.[3] In the same case it was held, that a similar policy taken out directly by a creditor to secure a similar debt, and collateral to the debt, was valid. The court say, "If the creditor of an infant, for a consideration paid by himself, obtains a guaranty of the infant's debt from a third party, I see no reason why such third party should not be bound, nor why the creditor should not have the benefit of his bargain. The infant certainly is not entitled to the funds thence arising. This would be to give him the whole of the creditor's goods on the plea of infancy, and, as a premium on the plea, the whole proceeds of the policies."

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[1] Rawls v. American Life Ins. Co. 36 Barb. 357; s. c. 27 N. Y. 282.

[2] *Ante*, § 13.

[3] Rivers, Administrator, v. Gregg, 5 Rich. Eq. 274.

§ 29. **Statement of Interest in Application.**—It was in one case held that the statement in the application accepted by the insurance company, that the person had an interest in the life was a sufficient proof of interest,[1] but this decision was overruled on appeal.[2] It has, however, been recently held[3] in Connecticut, in an action brought to recover premiums paid on a canceled policy, that the statement of interest in the application made the policy *prima facie* valid, so that it could only be avoided by parol evidence of want of interest.

§ 30. **Interest need not Continue.**—Though there were some early decisions to the contrary, founded chiefly upon the overruled case of Godsall v. Boldero,[4] it is now settled that, if there is any insurable interest, so as to make the policy valid at the time of its issue, it will, in the absence of a stipulation to the contrary, remain valid, no matter what may subsequently occur to change the amount of the interest, or even to terminate it entirely. If obtained by one having at the time an insurable interest, it may be assigned to one who has not, and never had any interest in the life insured.[5]

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[1] Ruse v. Mut. Benefit L. Ins. Co. 26 Barb. 556.

[2] 23 N. Y. 516.

[3] Lewis v. Phœnix Mut. L. Ins. Co. 39 Conn. 100.

[4] 9 East, 72.

[5] Valton v. National Fund L. Ass. Soc. 22 Barb. 9; s. c. 20 N. Y. 32; Hogle v. Guardian L. Ins. Co. 6 Robertson, 567; s. c. 4 Abb. N. S. 346; Succession of Hearing, La. Dist. Ct. of Orleans, MSS. Such is apparently the general rule expressly laid down, and also that which logically follows from other decisions. But in a recent case in Massachusetts (Stevens v. Warren, 101 Mass. 564), where an assignee claimed to hold a policy which was by its terms not assignable without consent, the court say: "The general rule, recognized by the courts, has been, that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life. Loomis v. Eagle Ins. Co. 6 Gray, 396; Lord v. Dall, 12 Mass. 115. Dewey K. Warren had no such interest, and could not legally have procured insurance upon the life of Barton. We understand the answer to deny that the policy was held by Warren as creditor and for his security, and to assert an absolute right by purchase. The rule of law against gambling policies would be completely evaded, if the court were to give to such transfers the effect of equitable assignments, to be sustained and enforced against the representatives of the assured. When the contract between the assured and the insurer is 'expressed to be for the benefit of' another, or is made payable to another than the representatives of the assured, it may be sustained accordingly. Gen. Sts. c. 58, § 62; Campbell v. New England Ins. Co. 98 Mass. 381. The same would probably be held in case of an assignment with the assent of the insurers. But if the assignee has no interest in the life of the subject of insurance which would sustain a policy to himself, the assignment would take effect only as a designation, by mutual agreement of the contracting parties, of the person who should be entitled to receive the proceeds, when due, instead

If obtained as security for a debt, it remains valid for the full amount after the debt is paid, so that the creditor may really be paid twice over, once by his debtor, and once by the insurance company,[1] and it is of no importance, so far as the company is concerned, what the assignee paid as a consideration for the assignment.[2]

Where a husband's life was insured for the benefit of his wife, the policy was held not to be determined by her obtaining a divorce from him, as she had an interest when the policy was obtained.[3]

§ 31. **General Conclusions.** — It must be borne in mind

of the personal representatives of the assured. And if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained." The Supreme Court of Indiana has recently adopted the same rule. Franklin L. Ins. Co. v. Hazzard, 2 Ins. Law Jour. 180. The court say: "All the objections that exist against the issuing of a policy to one upon the life of another, in whose life the former has no insurable interest, seem to us to exist against his holding such policy by mere purchase and assignment from another. In either case the holder of such policy is interested in the death, rather than the life, of the party assured. The law ought to be, and we think it clearly is, opposed to such speculations in human life. In our opinion, no one should hold a policy upon the life of another in whose life he had no insurable interest at the time he acquired the policy, whether the policy be issued to him directly from the insurer, or whether he acquired the policy by purchase and assignment from another. * * * In this case there was but a simple purchase of the policy by Hazzard. He had no interest whatever in the life of the assured. He was a mere speculator upon the probabilities of human life. His contract of purchase was essentially a wager upon the life of Cone, and his interest lay in the payment of few or no intermediate annual premiums, and the early happening of the event which was to entitle him to the $3,000. By his purchase he became interested in the early death of the assured. We are of opinion that the law will not uphold such purchases, and that the appellee acquired no right to the policy or to the sum secured thereby. Life assurance policies are assignable, to be sure, but in our opinion they are not assignable to one who buys them merely as matter of speculation, without interest in the life of the assured."

[1] Rawls v. Am. L. Ins. Co. 36 Barb. 357; s. c. 27 N. Y. 282; Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415; Phœnix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616. The remarks to the contrary in Leonard v. Eagle Life & Health Ins. Co. 4 Livingston's Law Mag. 286, and in Mut. L. Ins. Co. v. Wager, 27 Barb. 354, are overruled. There is a dissenting opinion in Kennedy v. N. Y. L. Ins. Co. 10 La. An. 809. It is, however, to be noted that in the first of the cases cited in support of the doctrine laid down in the text, the creditor and assignee actually had at the death an existing interest to the amount of the policy.

[2] St. John v. Am. Mut. L. Ins. Co. 5 Duer, 419; s. c. 3 Kern. 31. The assignor having insured his own life, there was, of course, an existing interest at the time of his death.

[3] McKee v. Phœnix Ins. Co. 28 Missouri, 383. The court place their decision apparently on the ground that the wife's interest still continued, because she had four children whom she supported, but who had the right to look to the husband for support. But the case is to be sustained on the ground stated in the text.

that while the law of England and America are now, since Godsall v. Boldero has been overruled, in agreement upon the point that it is sufficient if an interest exists at the time the policy is issued, and that it is unimportant whether the interest continues at the time of the death; yet, on the other hand, the law of England, in consequence of the express provision of the Gambling Act, only allows a recovery of the amount of interest which existed when the policy was issued, while the law of America seems to hold that any interest then existing will uphold a policy for a much larger nominal sum, provided it is not so large as to show that the transaction was intended to be a wager.[1] Certainly if the amount of interest is uncertain, as it always is when it is derived from relationship, the amount named in the policy will be conclusively taken as its amount. But where the interest which upheld the policy was a moneyed one, I am not aware of any case, where in fact, a recovery has been had by suit of more than the debt which existed when the policy was obtained;[2] though the doctrine of the cases just cited imposes no such limit, and in practice the companies pay without regard to such limit. Upon principle it is obvious that an insurance of more than the debt is allowable, for while on the one hand the debt will increase by the addition of interest, on the other, the payment of premiums is a constant expense.

With reference to the insurable interest arising, or implied from relationship, the correct view would seem to be that an insurable interest will be held to exist where the relationship is such that the assured has a legal claim upon the insured for services, or for support, or where, though such legal claim does not exist, yet from the past personal relations of the two, and the treatment of the assured by the insured, or possibly his declared intentions, the assured has a reasonable right to expect some pecuniary advantage from the continuance of the life of the insured, or to fear loss from his death. On this principle, a father would have an insurable interest in

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[1] *Ante*, §§ 17, 26.

[2] Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415, may be such a case.

the life of his child, whether a minor or of full age, and the child in the life of his father. So would a wife in the life of her husband, and a husband in the life of his wife. But a brother or sister would not have such interest in each other, nor a nephew in an uncle, unless some facts outside of the mere relationship are shown, though those facts might be very slight.

§ 32. **Who may become Insurer.**—In the absence of statutory provisions to the contrary, an individual may become an insurer and issue policies,[1] but though the business of life insurance was originally transacted to some extent by individuals,[2] it is now transacted wholly by corporations or associations organized for that purpose. Such bodies are limited as to their powers, in the case of a corporation by their charter, and in the case of an association, by their articles of association. In this country life insurance is pursued wholly by corporate bodies. Such bodies are of three kinds: First, ordinary stock companies carrying on their business for the benefit of their stockholders, among whom their earnings are divided, and having no other duty towards persons insured by them, than to fulfill the terms of the agreements contained in the policies issued by them. Second, mutual companies, in which there are no stockholders properly so called, but in which every person insured becomes a member, is entitled to an equal voice in the management of the company, shares in its profits, and is bound by its rules. Third, companies which, while having stockholders who are entitled to a portion of the profits, share them in some agreed ratio, or on some agreed plan with those insured by them, and which, therefore, partake in a measure of the characteristics of both stock and mutual companies; but so far as relates to legal questions, they are to be regarded rather as stock than as mutual companies. The manner in which companies act, and the peculiar rules applicable to mutual oompanies, will be more conveniently considered hereafter.

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[1] Trustees of the First Baptist Church v. Brooklyn F. Ins. Co. 19 N. Y. 305, 310. The Code of Georgia provides (§ 2777) that "Contracts of life insurance can be taken only by persons or corporations, specially authorized by law."

[2] *Ante*, § 1.

CHAPTER III.

THE BASIS OF THE CONTRACT OF LIFE INSURANCE, INCLUDING THE APPLICATION AND THE DOCTRINE OF WARRANTY, REPRESENTATION AND CONCEALMENT.

§ 33. **Formal Application usual, but not Essential.**—The contract of life insurance is in practice nearly or quite always entered into in consequence of a written application made therefor to the company, though there is nothing in the nature of the contract which requires a written or, indeed, any formal application.[1] In this application, or subsequent to it, the insurer requires certain information; and it is in reliance upon the correctness of this information that the company enters into the contract. It can ordinarily have no knowledge of many of the facts which it is essential for it to know, before it can enter into an equitable contract; while, on the other hand, that knowledge is possessed chiefly by the insured, who is in this country ordinarily the applicant in fact, if not in form. In this respect the insurer upon life is much more at the mercy of the insured than is the case in fire insurance; for there is much of the necessary information which no examination will enable the insurer to obtain if the insured does not aid him by full and correct answers. In practice, the company requires the person seeking to be insured to answer a series of questions, and also reserves the right to put similar, but less minute, inquiries to the physician of the insured, and to some third person referred to by him. From the duty of giving and the practice of requiring information has grown the law of warranty, representation and concealment, which is a most important portion of the law of life insurance. Owing to the form in which the ap-

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[1] Blake v. Exchange Mut. F. Ins. Co. 12 Gray, 265; Newman v. Springfield F. & M. F. Ins. Co. 2 Ins. Law Jour. 682; Clinton v. Hope (L.) Ins. Co. 1 Ins. Law Jour. 436.

plication and the policy are now usually framed, many of the considerations which have been important and decisive in some reported cases, have ceased to be of any great practical value. Every answer given, and every statement made, to the company, is now by the contract usually expressly converted into a warranty, while most of the difficult questions connected with the doctrine of concealment are avoided. It is, however, none the less necessary to refer in some detail to these earlier cases. But it must be continually borne in mind that the parties have the right to make a part of their contract any stipulations or conditions which they choose, and that when made they are to be enforced against both parties, without reference to the question of what would have been the legal effect if such stipulations or conditions had not been introduced into the contract.[1]

§ 34. **Definition of Warranty.**—A warranty is a stipulation forming a part of the contract as it has been completed,

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[1] Reynolds v. Comm. F. Ins. Co. 47 N. Y. 597; Swick v. Home L. Ins. Co. 2 Dill. 160; s. c. 2 Ins. Law Jour. 415; Washington L. Ins. Co. v. Haney, 2 Ins. Law Jour. 283; Savage v. Howard F. Ins. Co. 2 Ins. Law Jour. 769; Pindar v. Resolute F. Ins. Co. 47 N. Y. 114.

It is worthy of consideration whether, as the questions put by the companies are now carried into such details, it would not be equitable to provide that only those statements should be held to be warranties which relate to the insured himself, or which he either knows or may be presumed to know, while answers relating to other matters should be regarded only as representations. Maine has a statute, apparently applicable only to fire and marine insurance (1861, chap. 34), which makes certain statements representations, and not warranties, without reference to the language of the policy. The same statute provides that a concealment of immaterial facts shall not avoid the policy, unless it is designed and fraudulent. In New Hampshire a similar statute, not applicable to life policies, provides that no policy "shall be void by reason of any error, mistake, or misrepresentation, unless it shall appear to have been intentionally and fraudulently made." See Delaney v. Ins. Co. 52 N. H. 581. Ohio has by statute (Laws of 1872, 140, 160) provided that "all life insurance companies, after having received at least three annual premiums on any policy issued on the life of any person in the State, are hereby estopped from defending against any claim arising upon such policy by reason of any errors, omissions, or misstatements of the assured in any application made by such assured in which said policy was issued, except as to age or fraud." This act is very loosely drawn, and has, it is believed, not as yet received any judicial construction. Among the questions it suggests are the following: Does it apply to policies issued out of the State to persons living in the State, and if so, is it constitutional? If it is confined to policies issued in the State, when may a policy be said to be so issued? (See *post*, chap. xi.) What is the "fraud" which the company may set up? Who is "the assured" within the meaning of the statute? Does the law apply to policies issued before its passage?

and is construed as a condition precedent, which must be strictly complied with to the minutest detail, or else the contract is rendered void,[1] and, as will be shown hereafter, it makes no difference whether the thing warranted has apparently anything to do with the risk, or whether its breach proceeds from intention, mistake, or fraud. In any event, the instant the warranty is shown to have been broken, the policy must be declared absolutely void. When the contract is in writing, that is, when a policy has been issued or prepared, or the proposal and acceptance of the risk are in writing, the warranty must be contained in it, either by direct recital, or by incorporation.[2] But no particular form of words is necessary to constitute a warranty, as for instance, the word "warranty" or "warranted" need not be used. Words of affirmation, affirming matter of fact upon the faith of which the party contracts, are as competent to make a warranty as any strict technical terms.[3] The intention of the parties, as shown by the language used, decides whether any statement is a warranty or only a representation.

§ 35. **Definition of Representation.**—A representation is a verbal or written statement made before the issue of the policy, as to the existence of some fact, or state of facts, tending to induce the insurer more readily to assume the risk, or to assume it for a less premium, by diminishing the estimate he would otherwise have formed of it.[4] It is of some matter

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[1] Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co. 1 Cliff. 300; Glendale Woolen Co. v. Protection (F.) Ins. Co. 21 Conn. 19; Bunyon, 33; Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101. A warranty has been defined to be a condition precedent, but this definition seems applicable only to a warranty relating only to the commencement of the risk, and not to apply to a promissory warranty. Phillips, § 771. But see Ripley v. Ætna (F.) Ins. Co. 30 N. Y. 136, 158; Arnould, 577.

[2] Daniels v. Hudson River F. Ins. Co. 12 Cush. 416, 423; Higbie v. Guard. Mut. L. Ins. Co. 2 Ins. Law Jour. 761; s. c. 8 Alb. Law Jour. 392.

[3] Sceales v. Scanlan, 6 Irish Law Rep. 367; see Pawson v. Watson, Cowp. 785, 787. Angell's definition of warranty (§ 140) is a "stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin, or transversely, or on a subjoined paper referred to in the policy." And this definition has been cited with approval by the Court of Appeals of New York, in Ripley v. Ætna (F.) Ins. Co. 30 N. Y. 136, 157.

[4] Arnould, § 182. Phillips defines a representation (§ 524) as the communication of

extrinsic to the contract, a collateral statement of facts, incidental to the risk,[1] and forms a part of the preliminary proceedings which prepare a contract. It may be made orally or in writing.[2] A fact or statement which has a tendency to influence the insurer, as above stated, is called a material fact or statement, while one having no such tendency is called immaterial.

A misrepresentation is a false representation of a material fact by one of the parties to the other, tending directly to induce the other to enter into the contract, or to do so on terms less favorable to himself, when he otherwise might not do so at all, or might demand terms more favorable to himself. It is equally a misrepresentation, whether it relates to a matter as to which he need not have said anything, or to a matter

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a fact, or the making of a statement by one of the parties to a contract of insurance to the other in reference to a proposal for their entering into the contract, tending to influence his estimate of the character and degree of risk to be insured against. Chief Justice Marshall says, in Livingston v. Maryland Ins. Co. 7 Cranch, 585: "There should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion."

[1] Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co. 1 Cliff. 300; Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381; Bunyon, 22.

[2] Phillips, §§ 526, 586*a*; Bunyon, 32. Mr. Duer (Insurance, vol. 2, p. 644), after quoting Marshall's definition of a representation, namely, "a collateral statement either by writing not inserted in the policy, or by parol, of such facts or circumstances relative to the proposed adventure as are necessary to be communicated to the underwriters to enable them to form a just estimate of the risks," and admitting that it has been generally adopted, objects to it on various grounds. He says: First, that in some cases a representation may be inserted in the policy, and secondly, that it is not always of a collateral statement; the latter objection he deems of importance, as bearing upon the position taken by him, that it is not solely on the ground of fraud that a misrepresentation vitiates a contract. (See *post*, § 49.) Mr. Duer further objects to Marshall's definition, that it confines a representation to facts necessary to be communicated to the insurer. He, therefore, frames a definition of his own as follows: "A representation is a statement of facts, circumstances, or information, tending to increase or diminish the risks, as they would otherwise be considered, made prior to the execution of the policy by the assured or his agent to the insurer, in order to guide his judgment in forming a just estimate of the risks he is desired to assume. It is usually made by parol or by a writing not inserted in the policy, but when the intention as to the construction is sufficiently declared, may be expressed in the policy."

There is in a note to Goram v. Sweeting (2 Williams' Sanders, 200) an elaborate statement of the law of warranty and representation. In so far as the distinctions between the two are there pointed out, it has been approved in the recent case of Benham v. United Guar. & L. Ass. Co. (7 Exch. 744; s. c. 14 Eng. Law & Eq. 524), a case of guaranty insurance.

as to which he was bound to speak. It is a misrepresentation to state as a fact what he does not know to be true, as well as what he knows to be untrue. A misrepresentation may be made purposely, or through mistake, negligence, inadvertence, or forgetfulness.[1] If made purposely, there is, of course, both moral and legal fraud. If not made purposely, there may be legal fraud without involving moral fraud. As the insurer is supposed to rely upon the truth of the representation, the reason of its being erroneous can obviously have no bearing upon its effect.[2]

§ 36. **Effect of Warranty.**—A warranty must be strictly complied with. It makes no difference, whether it is as to a material or a trivial fact. It forms a part of the contract, and the parties have a right to introduce into their contract any provisions (not inconsistent with public policy) which they choose. By introducing them they stipulate, in effect, that they are so material that, if not strictly complied with, the whole contract is rendered void.[3] A misstatement in a warranty is therefore fatal to the contract, although arising from the most innocent mistake, or from false information afforded by others, or from mere inadvertence, and as much so as if made with the most wilfully fraudulent intent.[4]

Lord Mansfield says, that in a warranty, "nothing tanta-

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[1] Phillips, § 529; Arnould, § 189; Daniels v. Hudson River F. Ins. Co. 12 Cush. 416. "The instruction 'that an untrue statement innocently made in regard to a latent disease, of which the applicant was unconscious, would not avoid the policy,' as a general statement of the law applicable to representations in insurance contracts, was incorrect. An untrue statement or denial of a material fact, preceding or contemporaneous with the contract of insurance, prevents the policy that is based on it from taking effect as a contract, whether the statement was made ignorantly and in good faith, or otherwise." Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 387, 396.

[2] May on Ins. § 181.

[3] Anderson v. Fitzgerald, 4 H. of Ld.'s Cas. 484; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1; Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co. 1 Cliff. 300; Burritt v. Saratoga Co. M. F. Ins. Co. 5 Hill, 188; Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381; Vose v. Eagle L. & Health Ins. Co. 6 Cush. 42. See *ante*, § 34.

[4] Bunyon, 31; Nicoll v. Am. (F.) Ins. Co. 3 Woodb. & M. 529; Sayles v. N. W. (F.) Ins. Co. 2 Curt. C. C. 610; Holabird v. Atlantic Mut. L. Ins. Co. 2 Dillon, 166, *in notis*; s. c. Ins. Law Jour.; Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415; Brennan v. Security L. Ins. Co. 4 Daly, 296; Smith v. Ætna L. Ins. Co. 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116; Higbie v. Guardian Mut. L. Ins. Co. 2 Ins. Law Jour. 766; s. c. 8 Alb. Law Jour. 392.

mount will do or answer the purpose. It must be strictly performed."[1] Mr. Justice Buller says,[2] "It is a matter of indifference whether the thing warranted be or not material, but it must be literally complied with." Mr. Justice Ashhurst says, "The very meaning of a warranty is to preclude all question whether it has been substantially complied with; it must be literally so."[3] Lord Eldon says, "If there is a warranty, it is a part of the contract that the matter is such as it is represented to be."[4] Lord Mansfield says, in one case, "The contract depends on an event taking place. There is no latitude, no equity; the only question is, has that event happened,"[5] and in another, "A warranty in a policy of insurance is a condition or a contingency, and unless that is performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but being inserted, the contract does not exist unless it is literally complied with."[6] And Lord St. Leonards says,[7] "It is simply sufficient and ought to be sufficient to avoid the policy that any one thing warranted is not true."

§ 37. The effect of a warranty is thus stated by Marshall,[8] in a passage which has been recently cited with approval by the New York Court of Appeals:[9] "A warranty, being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose or with what view it is made, or whether the insured had any view at all in making it. But being once inserted in the policy, it becomes a binding condition on the insured, and unless he can show that it has been literally fulfilled, he can derive no benefit from the policy. The very meaning of a warranty

[1] Pawson v. Watson, Cowp. 785.
[2] Blackhurst v. Cockell, 3 T. R. 360.
[3] De Hahn v. Hartley, 1 T. R. 343.
[4] Newcastle F. Ins. Co. v. Macmorran, 3 Dow's Parl. Cas. 255.
[5] Hibbert v. Pigou, Marsh. on Ins. 370.
[6] De Hahn v. Hartley, 1 T. R. 345.
[7] Anderson v. Fitzgerald, 4 H. of Ld.'s Cas. 484; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1.
[8] P. 347.
[9] Ripley v. Ætna (F.) Ins. Co. 30 N. Y. 136, 163.

is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed. * * With respect to the compliance with warranties, there is no latitude, no equity. The only question is: Has the thing warranted taken place or not? If not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty." It has been said,[1] that the only conceivable cases in which a compliance with an express warranty might be excused, would be if the state of things contemplated by the warranty were to cease, or if a subsequent law should pass rendering a compliance illegal.

§ 38. The warranty of correctness is absolute. It is not that the statement is believed to be true by the party who makes it, but that it is true in point of fact.[2] This is illustrated in Duckett v. Williams.[3] The declaration signed by the assured embraced an agreement that if any untrue averment was contained in it, or if the facts required to be set forth were not truly stated, the premiums should be forfeited and the policy be void. The statement as to health was untrue, in point of fact, but not to the knowledge of the party making it. The plaintiff, having failed in an action on the policy, brought a new one to recover the premiums. It was held that the premiums were also forfeited. Lord Lyndhurst says, "It was contended that the words must mean 'truly' or 'untruly,' within the knowledge of the party making the statement; and that if the party insuring ignorantly and innocently makes a misstatement, he is not to forfeit the premiums under the clause in question. We are of opinion, however, that this is not the real meaning of this clause. A statement is not the less untrue because the party making it is not apprised of its untruth, and looking at the context, we think it clear that the parties did not mean to restrict the

[1] Arnould, § 214; Phillips, § 769.
[2] Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415.
[3] 2 Cr. & M. 348; s. c. 4 Tyrw. 240.

words in the manner contended for. Two consequences are to follow if the statement be untrue; one, that the premiums are to be forfeited; the other, that the assurance is to be void. Now, if the statement were untrue, within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and therefore, must be so as to the first; for it would be contrary to all the rules of construction to hold that it was material as to one consequence and not as to the other." So in Day v. Mutual Benefit Life Insurance Co.,[1] the court say: "We are of opinion that if the statements made by Day in the application, being part of the contract to procure the policy, were untrue in point of fact, the contract became null and void. This results from the form of the contract. It was evidently the design to protect the company from the ignorance, as well as wilful misrepresentation of those applying for insurance. If, for instance, Day did not know or suppose that he had consumption, although in point of fact that fatal disease had already seized upon his lungs, his statement would be contrary to the fact in an important respect, for no company would insure a life subject to so much risk. It would be untrue as matter of fact, and therefore fatal to the contract."

§ 39. **No Question of Materiality in Warranty.**—In like manner the question of materiality has no bearing in case of a warranty.[2] This is shown in part in Anderson v. Fitzgerald[3]—a most important case upon the law of life insurance,

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[1] Supreme Court of Dist. of Col. 1 Washington Law Rep. 22.

[2] Wash. L. Ins. Co. v. Haney, 2 Ins. Law Jour. 283; Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 253; Brennan v. Security L. Ins. & Ann. Co. 4 Daly, 296; Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415; Fitch v. Am. Pop. L. Ins. Co. 2 N. Y. Supreme R. 247; Holabird v. Atlantic Mut. L. Ins. Co. 2 Dillon, 166, *in notis*; s. c. 2 Ins. Law Jour. 588; Smith v. Ætna L. Ins. Co. 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116; Higbie v. Guardian Mut. L. Ins. Co. N. Y. Ct. of Appeals, 2 Ins. Law Jour. 761; Day v. Mut. L. Ins. Co. Supreme Ct. of Dist. of Col. 1 Washington Law Rep. 22; Conver v. Phœnix Mut. L. Ins. Co. U. S. Circuit, Minnesota, 6 Chicago Leg. News, 144. Some of the language of the court in France v. Ætna L. Ins. Co. U. S. Circuit, E. D. of Penn. 2 Ins. Law Jour. 657, which seems to hold that answers which are part of the contract do not work a forfeiture unless they are material to the risk, is hardly correct

[3] H. of Ld.'s Cas. 484; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1.

decided in 1854 by the House of Lords, in which all the English judges concurred in reversing the decision of the Irish courts, though the case did not turn upon this precise point. As the greater portion of the contracts of life insurance are now made upon applications almost identical in language with that adopted in this case, it is proper to refer to it at some length. The policy contained a provision against any disease tending to shorten life, as to a temperate life and a sound constitution. It then continued, "or if anything so warranted as aforesaid shall not be true, or if any circumstance material to the insurance shall not have been truly stated or shall have been misrepresented, or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practiced on the said company, or any false statement made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void." Baron Parke says that the Lords have proposed two questions. The first is, "Was it necessary for the plaintiff in error to prove on the trial that the answers given by Fitzgerald to questions 21 and 22, or either of them, were or was material as well as false?" "The answers referred to by your lordships were given to two questions put to the assured, Fitzgerald; the first, whether any of the party's near relatives died of consumption or other pulmonary complaint? and secondly, whether the party's life had been accepted or refused at any other office; and if accepted, whether at the usual premium, or with what addition? To both, the assured answered in the negative. At the end of the list of questions the assured subscribed a declaration to the effect that the particulars should form the basis of the contract between the assured and the company, and that if there should be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the company, or if there should be any fraud or misstatement, all the money paid on account of the insurance should be forfeited and the policy should be void.

"The first question, then, submitted to us is, whether it was necessary for the plaintiff in error to prove on the trial that the above answers, or either of them, were or was material as well as false? We are all of opinion that it was not. This question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord Mansfield, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties independent of the policy, or meant to be referred to by it. The proviso is clearly a part of the express contract between the parties, and, on the non-compliance with the condition stated in the proviso, the policy is unquestionably void. The case, therefore, resolves itself, in our view of it, simply into a question of the construction of the proviso itself. * * * By that proviso it is stipulated, first, that if the assured should die on the high seas (with certain exceptions), or should kill himself, or die by dueling, &c., or if anything warranted as before mentioned (and there were several express warranties before stated) should not be true, or if any circumstance material to that insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the company, the policy should be void. Thus far the condition applies only to material matters; but it proceeds to declare, obviously with a view of extending the protection to the office still further, that if any fraud shall have been practiced on the company, or any false statements made to the company, in or about the obtaining or effecting of that insurance, the policy shall be null and void. The latter words probably override the former; and the fraud as well as the false statement, in order to avoid the policy, must be made in or about the obtaining or effecting of that insurance. These words, no doubt, must be understood not to include a false statement of matters to the disparagement of the applicant for insurance, and tending to render his life less insurable; such a construction would be clearly absurd, and in no way reconcilable

with the manifest object of the proviso. The words, however, will clearly include all frauds or false statements made in order to obtain the policy, whether in matters material or not; a consistent construction will thus be given to the whole. The proviso, in the first place, provides for the violation of the special matters mentioned in the commencement of it. Next, it requires every material fact not to be misrepresented or concealed, but to be fully and fairly declared. But it goes further. In the anxiety of the company to protect itself by every precaution, it prohibits any fraud or falsehood whatever to be used in obtaining the insurance. It includes all frauds for that purpose, though not made by concealment or misrepresentation, by word or writing, of material facts, such as fraud in false personation, or in the disguise of the diseases of the applicant; and lastly, it prohibits every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute whether the particular matter to which it related was material or not (which in the case of a dispute a jury would have to decide), leaving the company to determine entirely for itself what matters it deems material and what not. * * A doubt, possibly, may exist whether the word 'false' is to be understood in the sense of false in point of fact, or morally false; though I believe most of us think that it is not to be limited to moral falsehood, but there seems to us to be no doubt, that if the statements are false, in whatever sense we understand that word, being used in effecting the insurance, this proviso operates. There, then, appear to us to be only two questions for the jury on this part of the policy: Were the statements false? Were they made in obtaining or effecting the policy? Whether they are material or not is not a necessary part of the inquiry. * * * It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were made with the object of obtaining the policy, because if immaterial they would not be likely to effect it; but the materiality is not a necessary condition to bring them within

the scope of the proviso, if it can be shown that the statements were made in obtaining the policy and for the purpose of effecting it; and here the terms of the particulars and the subjoined declaration preclude all doubt upon that question; for the truth of the answers is, in the strongest terms, made essential to the validity of the policy."

The Lord Chancellor says: "The company stipulates this, that the assured shall contract with the company that he warrants certain things to be correct; and further stipulates that if he should make to the company any untrue statement in and about effecting the policy, such untrue statement shall avoid the policy; and then the company says, that it will not contract with him till he shall answer certain questions which are made the basis of the contract. Among those questions are these two: 'Have any of your relations died of pulmonary complaints? Has an insurance on your life been accepted or refused at any other office?' The stipulation is that if he shall not answer these questions accurately, the policy shall be void. That is the interpretation of the contract, which, taking together the policy and the particulars required to be subscribed, appears to me irresistible. The requirement is extremely reasonable. * * * The reason for making such a stipulation is obvious, and is explained by this very case. Whether certain statements are or are not material where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material; and, if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy. Now, it appears to me, my lords, that that is precisely what has been done here. The parties entering into the insurance have so stipulated. 'The basis of our contract shall be your answering truly these two questions.' There

were a great many others; but, putting those aside, they say —'The basis of the contract between us shall be that you shall answer truly those two questions; and if you do not answer them truly, the policy shall be void.' But then, when the trial comes as to whether the plaintiff has made out his right under that policy, the question is, whether the direction to the jury ought not to have been: 'You are to ascertain whether what was then stated was untrue, was false. Whatever interpretation may be given to the word "false," if it was false, there is no question as to whether it was material or not, the parties having stipulated that if it was false the policy shall be void.' The question for the jury to decide was simply whether it was false or not. In that narrow compass the whole case lies. The learned judges who decided that the direction actually given was good, proceeded upon the well known rule of law, that there is a great distinction between that which amounts to what is called a warranty and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance says, 'I warrant such and such things, which are here stated,' and that is part of the contract, then whether they are material or not is quite unimportant, the party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bona fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bona fide* or not, if it is not material, the untruth is quite unimportant. If the man, on entering into the policy, had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, and such statement did not form part of the contract, then, though false, it would be quite immaterial. If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover. * * * My lords, it is within this

narrow compass that the case lies. We had the advantage of the assistance of eleven of the learned judges of this country. They all took the same view of this case, and they were all of opinion that the learned judges in Ireland committed an error in supposing that the doctrine of representation, as distinguished from warranty, was applicable to the present case, where the representation is itself included in the contract."[1]

§ 40. **Representation to be Substantially true in Material Respects.**—A representation, however, need only be substantially complied with, and in particulars material to the risk, though if the misrepresentation is fraudulent, it will avoid the contract, even where it relates to a matter not material to the risk;[2] that is to say, if the mispresentation is made with intent to deceive, or is shown to have been false within the knowledge of the assured, it makes no difference whether it is as to a material circumstance or not. In such case all inquiry into its materiality is precluded. But if it is made from ignorance, accident, forgetfulness or mistake, it must be as to a material fact or circumstance, or it will not avoid the contract. The death need not in either case arise from a cause connected with the fact misrepresented.[3] A representation is construed according to the fair and obvious

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[1] In Cazenove v. Brit. Eq. Ass. Co. 6 C. B. N. S. 437, 452, Byles, J., says: "I think these words in the fourth condition, 'in case any fraudulent or untrue statement is contained in any of the documents addressed to or deposited with the company in relation to the within assurance, whether by the payee, the assured, or any referee or other person, then the policy shall be void,' interpreted by the decision of the House of Lords, in Anderson v. Fitzgerald, clearly mean this, that if any statement contained in either of the documents referred to be inconsistent or irreconcilable with the facts, whether it be material or immaterial, the policy is void." This case is reported in 5 Jur. N. S. 1309, and on appeal in 6 Jur. N. S. 826. In 5 Jurist, Byles, J., is reported as saying: "As I read it, if a man says he has had 365 days' illness, and in fact he has had 364 days, 23 hours, 59 minutes, 59 seconds, that is an untrue statement, and vitiates the policy."

[2] Wall v. Howard (F.) Ins. Co. 14 Barb. 383; Dewees v. Manhattan (F.) Ins. Co. 34 N. J. 244. But see the Ld. Chancellor in Anderson v. Fitzgerald, 4 H. of Ld.'s Cas. 484, 504; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1; *ante*, p. 56.

[3] Arnould, § 190; Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101.

import of the words, and is equivalent to an express statement of all the inferences naturally and necessarily arising from them.[1]

§ 41. **Characteristics of Warranty and Representation.**—The distinguishing characteristics of warranty and representation are stated by the Supreme Court of Massachusetts, in a recent case.[2] "A warranty, in insurance, enters into and forms a part of the contract itself. It defines, by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. No liability can arise except within those limits. In order to charge the insurers, therefore, every one of the terms which define their obligation, must be satisfied by the facts which appear in proof. From the very nature of the case, the party seeking his indemnity, or payment under the contract, must bring his claim within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon the plaintiff to present a case in all respects conforming to the terms under which the risk was assumed. It must be not merely a substantial conformity, but exact and literal; not only in material particulars, but in those that are immaterial as well. A representation is, on the other hand, in its nature, no part of the contract of insurance. Its relation to the contract is usually described by the term 'collateral.' It may be proved, although existing only in parol and preceding the written instrument. Unlike other verbal negotiations, it is not merged in nor waived by the subsequent writing. This principle is in some respects peculiar to insurance, and rests upon other considerations than the rule which admits proof of verbal representations to impeach written contracts on the ground of fraud. Representations to insurers, before or at the time of making a contract, are a presentation of the elements upon which to estimate the risk proposed to be assumed.

[1] Phillips, §§ 550, 565, 567; Arnould, § 196.

[2] Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381.

They are the basis of the contract—its foundation, on the faith of which it is entered into. If wrongly presented, in any respect material to the risk, the policy that may be issued thereupon, will not take effect. To enforce it would be to apply the insurance to a risk that was never presented. But when the insurer seeks to defeat a policy upon this ground, his position in court is essentially different from that which he may hold upon a policy containing a like description of the risk as one of its terms. It is sufficient for the plaintiff to show fulfilment of all the conditions of recovery which are made such by the contract itself. The burden is then thrown upon the defendant to set forth and prove the collateral matters upon which he relies.

"There is also another distinction very important in its practical application. As this defence relates entirely to the substance, and not to the letter of the contract, it can only prevail by proof of some representation material to the risk, and that it was untrue in some material particular. When statements or engagements on the part of the insured are inserted, or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy, they do not necessarily become warranties. Their character will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection or relation to other parts of the instrument. If they are contained in a separate paper, referred to in such a manner as to make it a part of the contract, the same considerations, of course, will apply. But if the reference appears to be for a special purpose, and not with a view to import the separate paper into the policy as a part of the contract, the statements it contains will not thereby be changed from representations into warranties. It is perhaps needless to add that verbal representations can never be converted into warranties, otherwise than by being afterwards written into the policy."

§ 42. **Whether Warranty or not Depends on Contract.**—By express contract parties may undoubtedly place a repre

tation upon the same footing as a warranty, and, *vice versa*, they may by agreement give to a warranty in the policy only the effect of a representation.[1] In practice, the companies now usually take care to make everything a warranty; that is, they either provide in express terms that all statements contained in the answers to questions, whether put to the person whose life is insured or to his physician, or to the friend referred to, shall be considered warranties, or they so refer in the policy to such answers as constituting the basis and forming a part of the contract, that they become, as matter of law, warranties.

§ 43. **Classification of Warranties.**—Warranties may be either express or implied. An express warranty must be construed to mean precisely what it says; and if it is clear and explicit, no evidence can be introduced *aliunde* to contradict, control, restrain, vary, or extend it.[2] An implied warranty, condition, or stipulation is an agreement not expressed in the policy, but presumed from the fact of making the insurance.[3] It is something contracted for which necessarily results from the terms of the contract. It is distinguished from a representation by the circumstance that the latter is usually expressed either in writing or verbally, or is the result of the phraseology used, but does not arise from the mere fact of effecting the policy. The doctrine of misrepresentation and concealment involves the principle of an implied warranty or condition; they avoid the policy because there is an implied agreement of the assured to make a fair disclosure of the circumstances affecting the risk, and the insurer takes the risk upon the condition that the assured has complied with the agreement.[4] Where a matter is sought to be included by implication in a warranty, it must be plainly material to the risk; otherwise an intention to warrant in

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[1] Angell, § 148; Arnould, § 186; Burritt v. Saratoga Co. Mut. F. Ins. Co. 5 Hill, 188.

[2] Angell, § 142*a*; Phillips, § 754; Glendale Man. Co. v. Protection (F.) Ins. Co. 21 Conn. 19.

[3] Phillips, § 686.

[4] Phillips, § 687; see *post*, § 48.

respect to the matter cannot be imputed to the parties.[1] A warranty will not be extended in its construction to include anything not necessarily implied in its terms.[2] This is illustrated by the well-known decision of Lord Mansfield, that a warranty in marine insurance of a convoy with a specified number of guns does not, in the absence of fraud, imply a warranty of a crew sufficient to work that number of guns.[3]

§ 44. **Affirmative and Promissory Warranties.**—Two classes of conditions are usually inserted in policies, one pointing to the time of the contract, and the other to something which may occur at a time subsequent. In one the assured undertakes for the truth of some existing fact, while in the other he undertakes to perform some executory stipulation.[4] The former is technically called an affirmative, and the latter a promissory warranty; and a breach of a warranty consists either in the falsehood of an affirmative or in the non-performance of an executory stipulation. A promissory warranty is said to be as much a condition precedent as an affirmative one, and if the promise has not been kept the insurer is not bound.[5] But there is a distinction between a positive engagement that certain material facts shall or will exist, and a mere expression of an expectation, hope, or belief that they will exist. A promissory warranty very frequently consists only in an expression of intention. Language in a policy which imports that the assured intends to do or not to do an act which materially affects the risk, involves generally an engagement to perform or omit such act. If the assured would reserve a right to change such intention, he must employ explicit language to denote the reservation.[6] It is, however, always a question for decision as to how the parties understood it at the time the contract was made; whether as an agreement, on the part of the assured, that he would do so

[1] O'Niel v. Buffalo F. Ins. Co. 3 Comst. 122; Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381; Sayles v. N. W. (F.) Ins. Co. 2 Curt. C. C. 611.

[2] Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381. [3] Hide v. Bruce, 3 Doug. 213.

[4] O'Neil v. Buffalo F. Ins. Co. 3 Comst. 122; s. c. 2 Ins. Law Jour. 101; Marshall, 347.

[5] Ripley v. Ætna F. Ins. Co. 30 N. Y. 136; Mut. Ben. L. Ins. Co. v. M[illegible] [illegible]5.

[6] Bilbrough v. Metropolis (F.) Ins. Co. 5 Duer, 587.

and so, or only as a statement of his then existing intention so to do, which he, however, did not undertake not to change; and very slight matters may decide which construction is the correct one in any particular case. Thus, in one case[1] a policy of guaranty had been given against loss from the want of integrity of the secretary of an institution. The questions put to and answers made by the applicant (who was another officer of the association) were made the basis of the contract. Besides questions as to the antecedents of the secretary, there were several as to the position he was to occupy, and among others, one as to what checks would be used to secure accuracy in his accounts, and when and how often they would be balanced and closed. The answer was, "Examined by finance committee every fortnight." It was concluded from the fact that the representation was not made by the person guaranteed, and from the collocation and connection of the questions, that the latter answer did not amount to a warranty, but was a mere representation of intention, and that the plaintiff could recover, though a loss subsequently occurred through the neglect to examine the accounts in that manner.

§ 45. An early case[2] presents an instance of the effect of the mere expression of a belief. An insurance was made on the life of one Sheppey, from the 1st of April, 1777, to the 1st of April, 1778. In an action on the policy, the question was as to the representation of his health at the time the policy was effected. It appeared that he went to the south of France for the benefit of his health, or to avoid his creditors, and there died within the time limited in the policy. The broker who effected the policy told the underwriters that the gentleman for whom he acted would not warrant anything, but from the account he (the broker) had received, he believed it to be a good life. Lord Mansfield,

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[1] Benham v. United Guar. & L. Ass. Co. 7 Exch. 744; s. c. 14 Eng. Law & Eq. 524; 16 Jur. 691; 21 L. J. Exch. 317.

[2] Stackpole v. Simon, Park on Ins. 932.

who tried the cause, said: "Where there is no warranty the underwriters run the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is fraud. * * The broker here does not pretend to any knowledge of his own, but speaks from information. There is no fraud in him."[1]

§ 46. **Classification of Representations.**—Arnould says,[2] a representation "may either be a positive affirmation by the assured, as of his own knowledge and upon his own responsibility, that the facts represented either do or will exist, or a mere declaration of his belief or expectation that such facts do or will exist, or a mere communication of information which he has received from others respecting them."[3] Angell says:[4] "There is, in the general law of insurance, a distinction to be drawn between promissory positive representations and representations of expectation or belief; the former being positive engagements that certain material facts shall or will exist; and the latter being merely expressions of expectation or belief that they will or do exist. It is easily comprehended that unless, in the former case, facts take place substantially corresponding with those specified, the underwriter shall not be liable on the policy. The latter imply no stipulation of the sort, and a non-performance accordingly can only avoid the policy in cases of actual fraud." "Upon the point of misrepresentation," says Mr. Justice Story, in a case of marine insurance,[5] "there is one other consideration which requires attention. Where a letter contains a representation of facts not known to the party, but from the information of others, and so the letter states the facts, or it is a necessary inference from the nature of them, there the representation is not falsified by the mere proof that the facts are not so, if the party communicating the facts did receive such information, and *bona fide* confided in it. He

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[1] See Mut. L. Ins. Co. v. Wager, 27 Barb. 354, 365. [2] § 182.

[3] Stackpole v. Simon, Parke on Ins. 932; Jones v. Prov. Ins. Co. 3 C. B. N. S. 65; s. c. 3 Jur. N. S. 1004; 26 L. J. C. P. 272.

[4] § 150. [5] Tidmarsh v. Wash. F. & M. Ins. Co. 4 Mason, 439.

undertakes there, not for the truth of the facts, but for the truth of his information." "A moment's consideration," says Arnould,[1] "will show that this distinction is well founded. If a man assures me positively that certain events, over which he has a control, and without which I should decline entering into the contract with him, shall take place in a given way, and I enter into the contract on the faith of that positive assurance, it seems clear that such statement must substantially be made good in order to make me liable on such contract. If, however, he merely tells me that he believes or expects that such events will happen in a certain way, and I choose to enter into the contract upon the mere chance of such belief or expectation turning out well founded, I have no right to be released from my contract on its proving fallacious; for its failure was a contingency which I ought to have contemplated on entering into my contract. If, indeed, I can show that, with a design to deceive me, he represented himself as expecting or believing that which he knew at the time to be impossible or untrue, I shall be released from my contract on the ground of this his actual fraud." The expression of an opinion, if honestly entertained and communicated, is not a misrepresentation, however erroneous it may prove.

§ 47. **Parol Promissory Representations.**—There is a difference of opinion, both among the courts and the text-writers, as to whether there can be such a thing as a promissory representation; that is, whether it is permissible to prove in avoidance of a policy any parol representation made before the issue of the policy as to some future fact. On the one hand, it has been contended that to permit such evidence would be to cast aside the rule forbidding the introduction of parol evidence to vary a written contract; while on the other hand, it has been contended that such evidence was admissible in accordance with the well-established rules governing the law of insurance. Chancellor Walworth, of New York, in an

[1] § 192.

elaborate decision in the case of Alston v. Mechanics' Mutual Insurance Co.,[1] utterly denied the existence of such a thing as a promissory representation; but that decision was in turn criticised in a most elaborate and learned manner by Mr. Duer in his work on Insurance,[2] and his views have been expressly adopted in Bilbrough v. Metropolitan Insurance Co. by a court of which he was a member.[3] On the other hand, the Supreme Court of Massachusetts in a recent learned opinion, while admitting that the modern text-writers recognize promissory parol representations, claims that they find no recognition in judicial decisions.[4] Of the text-writers, Marshall,[5] Phillips,[6] and Arnold[7] recognize the existence of parol promissory representations. This difference of opinion is closely connected with a disagreement as to the reasons upon which the doctrine that a false statement avoids the contract of insurance is founded. The earlier writers and decisions[8] place it entirely upon the basis of fraud, and some of the modern writers, like Mr. Arnould,[9] while admitting the difficulties in which this view is involved, adhere to the same doctrine, but seek to avoid the difficulties by the argument that, as a representation made through mistake or inadvertence has the same effect in reference to the insurer as an intentional and literally fraudulent misrepresentation or concealment—namely, it induces him to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded—therefore, it is permissible to employ the term "fraud" with reference to such an inadvertent misrepresentation, using it in

[1] 4 Hill, 329. To same effect Bryant v. Ocean Ins. Co. 22 Pick. 200.
[2] Vol. 2, pp. 648, 749. [3] 5 Duer, 587, 593.
[4] Kimball v. Ætna (F.) Ins. Co. 9 Allen, 540. [5] P. 450. [6] § 553.
[7] § 191. [8] Lord Mansfield, in Pawson v. Watson, Cowp. 785.
[9] § 187. Lord Abinger, in Moens v. Heyworth, 10 M. & W. 147, 155, says: "The fraud which vitiates a contract and gives the party a right to recover does not, in all cases, necessarily imply moral turpitude. There may be a misrepresentation as to the facts stated in the contract, all the circumstances in which the party may believe to be true. In policies of insurance, for instance, if an insurer makes a misrepresentation, it vitiates the contract; such contracts are, it is true, of a peculiar nature, and have relation as well to the rights of the parties as the event."

the sense of legal fraud, and not of moral fraud. Mr. Duer combats vigorously the view which bases the avoidance of the contract solely on the ground of fraud.[1] Mr. Phillips substantially agrees with him, and considers that the best way is to state the practical doctrine upon the subject in direct terms, namely, that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or arising through mistake.[2] The difference is not of sufficient importance in its practical application to life insurance as now conducted to render a further discussion profitable here, but the view taken by Mr. Phillips seems to be, on the whole, the most satisfactory.[3]

[1] Vol. 2, §§ 648, 749.

[2] § 537.

[3] The following extract from the decision in the case of Kimball v. Ætna Ins. Co. 9 Allen, 540, shows the view taken in Massachusetts: "In making this representation the utmost good faith is required. If an existing fact material to the risk is misrepresented by the owner to the underwriter, the minds of the parties never meet, they agree on no subject matter to which the contract can attach; the contract founded on such misrepresentation never takes effect; the underwriter may treat it as a nullity, and the other party, unless chargeable with fraud, may recover back the premium. If representations, whether oral or written, concerning facts existing when the policy is signed, are false, it never has any existence as a contract unless it contains in itself terms which expressly, or by necessary implication, waive or supersede the previous representations. If the representations are positive, and not of mere opinion or belief, it matters not whether they are made at or before the time of the execution of the policy, nor whether they are expressed in the present or the future tense, if they relate to what the state of facts is or will be when the policy is executed and the risk of the underwriter begins. If the facts are then materially different from the representations, the whole foundation of the contract fails, the risk does not attach, the policy never becomes a contract between the parties. Representations of facts existing at the time of the execution of the policy need not be inserted in it, for they are not necessary parts of it, but, as is sometimes said, collateral to it. They are its foundation; and if the foundation does not exist the superstructure does not arise. Falsehood in such representations is not shown to vary or add to the contract, or to terminate a contract which has once been made, but to show that no contract has ever existed. The word 'representations' has not always been confined in use to representations of facts existing at the time of making the policy, but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty, which must be strictly complied with), are sometimes called 'promissory representations,' to distinguish them from those relating to facts, or 'affirmative representations.' And these words express the distinction; the one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representa-

§ 48. **What is a Material Representation.**—Every representation is to be deemed material which there is just reason to believe determined or may have determined the insurer to insure, or influenced his estimate of the premium. The test of materiality is the probable influence of the statement upon the mind of the insurer. It is not absolutely necessary that the fact represented should have any direct bearing on the state or condition of the subject of the proposed insurance; it is sufficient that it either in fact did exert, or may reasonably be presumed to have exerted, an influence over the mind of the insurer in determining him to assume a responsibility he would not otherwise have undertaken, or in leading him to assume it for a less premium.[1] The question in such case is, whether, if the fact as presented had not been misrepresented, or had been represented truly, the tendency would have been to influence the mind of the insurer to decline the risk, or to demand a higher premium. Where this materiality depends upon circumstances, and is an inference to be drawn from them, and not upon the construction of a writing, it is a question of fact for the jury.[2]

The representation need have no bearing or effect upon

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tion may be inserted in the policy itself, or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract."

The court also say: "The policies having once taken effect cannot be terminated or avoided by the subsequent breach of an oral agreement made before they were executed."

[1] Arnould, § 194; Sibbald v. Hill, 2 Dow's P. C. 263; Angell, § 152; Hartman v. Keystone Ins. Co. 21 Penn. 466; Phillips, § 676. In Wainewright v. Bland, 1 Mood. & Rob. 481; s. c. 1 Tyrw. & Gr. 417; 1 M. & W. 32, one of the representations held to be false was the reason given for wishing to insure, while the other was as to the amount of other insurance. Counsel urged that as these matters did not affect the risk, they were not material, but it was held otherwise. Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101.

[2] May on Ins. § 195, and cases cited.

the question of health. This is illustrated by the decision of the New York Court of Appeals in Valton v. National Fund Life Assurance Co.,[1] where the court say: "The judge, among other things, charged the jury that if the insured untruly represented that he was a partner of the firm of Valton, Martin & Co., or that if he untruly represented that he was the moneyed man of the firm, and either or both of such untrue representations were material to the risk, then the policy was avoided, and there could be no recovery. That if Schumacher was dead in September, 1850, and his occupation that of a merchant at the time the proposals were signed, and the representations of his being a partner or the moneyed man of the firm were either not untrue or not material to the risk, then the action was *prima facie* sustained. The defendants' counsel requested the court to charge the jury that if Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was a partner of the firm of Martin, Valton & Co., when in fact at that time he was not such partner, and if the defendants would not have issued the policy if the representation had not been made, then the policy was void, and the plaintiffs could not recover. The judge declined so to charge, and the defendants' counsel excepted. The defendants' counsel also requested the judge to charge the jury that if they found that Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was the moneyed man of the concern of Valton, Martin & Co., when in fact at that time he was not such, and that the defendants would not have issued the policy if the representations had not been made, then the policy is void, and the plaintiffs cannot recover. The judge refused so to charge, and the defendants' counsel excepted. The charge of the judge was correct as far as given. If the representations were made and false, the falsity must have been known to Schumacher and Martin. The facts were within their knowledge, and the representations fraudulent. The requests to

[1] 20 N. Y. 32.

charge, considered in connection with the charge given, present the question whether fraudulent representations made by the assured to the insurer upon his application for a policy, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, will avoid the policy. This question has not been determined by any adjudged case in this state, so far as I have been able to discover. The elementary writers hold that the policy may be avoided.[1] In Sibbald v. Hill[2] it was held that when the assured fraudulently represented to the underwriter that a prior insurance by another underwriter upon the same risk had been made at a less premium than it was in fact made, the policy was vitiated. In this case it is obvious that the risk itself was not affected by the representations. Lord Eldon in his opinion says, that it appeared to him settled law, that if a person meaning to effect an insurance exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other person and disarm the ordinary prudence exercised in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or had done so under such terms that he came under no obligation to pay, it appeared to him to be settled law that this would vitiate the policy. The courts in this country would say that this was a fraud; not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence without which the party would not have acted. The principle of this case, when applied to the one under consideration, shows that the judge committed an error in refusing to charge as requested. It is clear that the circumstance of a party being engaged in commercial business, possessed of large means, might induce an insurer to make an insurance upon his life for a large amount, while were he a mere porter the risk would be rejected, although the chance of life would be as good in the latter situation as the former." On a subse-

[1] Arnould, § 189; 2 Duer, 681, 683; 3 Kent, 282.
[2] 2 Dow's Parl. R. 263.

quent appeal of the case,[1] Mullin, J., giving the opinion of the same court, says, "I entertain no doubt that in many cases a knowledge of the pecuniary circumstances of a person desiring to be insured is material to the risk as affecting in some degree the life."

§ 49. **Where Specific Questions asked, Matter is conclusively shown to be Material.**—If a fact is specifically inquired about, the insurer shows that he regards it as material, and a misrepresentation about it avoids the contract, though it may not in reality be material.[2] If, however, there is any conflict of evidence, it is in such a case a question for the jury whether the answer was true or not. As is said by the Supreme Court of the United States:[3] "The principal defense set up at the trial was that in the application for insurance false answers had been given to the questions propounded by the defendants. Those questions were, in substance, whether the person whose life was proposed for insurance had had certain diseases, or, during the next preceding seven years, any disease, and the answers given were that he had not. It was in reference to this that the court instructed the jury it was for them to determine from the evidence whether the person whose life was insured had, during the time mentioned in the questions propounded on making the application, any affliction that could properly be called a sickness or disease, within the meaning of the term as used, and said, 'for example, a man might have a slight cold in the head, or a slight headache, that in no way seriously affected his health or interfered with his usual avocations, and might be forgotten in a week or a month, which might be of so trifling a character as not to constitute a sick-

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[1] 1 Keyes, 21.

[2] Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 266; s. c. 1 Ins. Law Jour. 25; Conver v. Phœnix Mut. L. Ins. Co. U. S. Circuit, Minn. 6 Chicago Leg. News, 144; Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381, 403; Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415; Bobett v. Liv. & Lond. & Gl. Ins. Co. 66 N. C. 70; Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223; Anderson v. Fitzgerald, 4 H. of Ld's. Cas. 484; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1.

[3] Manhattan L. Ins. Co. v. Francisco, 2 Ins. Law Jour. 926.

ness or a disease within the meaning of the term as used, and which the party would not be required to mention in answering the questions. But again, he might have a cold or a headache of so serious a character as to be a sickness or disease within the meaning of those terms as used, which it would be his duty to mention, and a failure to mention which would make his answer false.' There is no just ground of complaint in this instruction, either considered abstractly or in its application to the evidence in the case." But if an answer is untrue, the jury have no right to say that the variation from the truth is as to a matter not material. Thus where the answer was that the insured had had no disease of or injury to any organ, and it was shown that he had had a disease of or injury to the eyes, it was held that the policy was void, though the affection of the eyes was several years previous, and was not shown to have affected his general health. So as to the question requiring the names of medical men who have ever attended him. An omission in this respect is fatal.[1]

It has been said that a misrepresentation as to an immaterial fact, even though fraudulently made, will not impair the contract if it can be affirmatively shown that it had no influence on the mind of the insurer;[2] but this may well be doubted. If the inquiry is once permitted as to the actual effect of a statement which is shown to have had a tendency to influence the insurer, the gates are thrown wide open for speculation rather than evidence, and for the exercise of feeling rather than judgment.

[1] Fitch v. Amer. Pop. L. Ins. Co. 2 N. Y. Supreme Court R. 247. Mr. May, in his recent work on Insurance, expresses (§§ 186, 187), the opinion that, though the putting of a specific question shows conclusively that it is material, still a substantial compliance with the statements contained in the answer to it is all that is required. He holds that while the materiality is not an open question, either for court or jury, yet that it is proper to submit to the jury "whether the answer, though strictly and technically untrue, is not substantially and materially true." In the sense intended these remarks are probably correct, but there is great danger in leaving to a jury the question whether an answer is substantially true, for under the guise of passing upon that matter they will be very apt to decide in effect that though untrue, the variation was as to an immaterial point.

[2] Phillips, §§ 540, 681. See Flynn v. Headlam, 9 B. & C. 692.

§ 50. A question has been raised as to whether a misrepresentation made to the medical examiner, upon a matter not relating to the health of the applicant, is such a misrepresentation as avoids the policy. There had been a misstatement to the medical examiner, as to the pecuniary position of the applicant, and his relations to the firm with which he was connected, but the medical examiner swore that his only business was to examine the person of the applicant, and to examine and report as to the physical condition of his body, and that he reported nothing else, though he was required to state, and did state, whether he recommended the acceptance of the risk. An attempt was made on the trial to ask him what effect, if any, the representation as to the pecuniary condition of the applicant had on his mind and report, and whether he would have recommended the acceptance of the proposal if he had known the real facts. These questions were excluded, and on appeal to the General Term, the exclusion was sustained;[1] but on appeal to the Court of Appeals the decision was reversed.[2] The court say: "The object of a physical examination of a person proposing to insure his life in an insurance company, by a competent physician, is to ascertain whether he is laboring under, or is subject to, any diseases or defect which may have a tendency to shorten life. The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of those organs and functions to take on diseases as affected by habits of mind as well as of body, temperament, tendency to disease from hereditary causes, and the occupation and condition in life of the subject. Of two persons of the same age and present bodily health, the one may present a risk entirely safe and proper to be taken, the other unsafe and improper to be taken. It is impossible to affix limits to the subjects into which it is not only proper

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[1] Valton v. Nat. Loan Fund L. Ass. Soc. 17 Abb. 268. There had been a prior trial, reported in 22 Barb. 9, and 20 N. Y. 32, but on that trial these questions do not seem to have been raised.

[2] 1 Keyes, 21. See *ante*, § 48.

but necessary for an examining surgeon to inquire, in order to arrive at a conclusion upon which he can safely advise the acceptance or rejection of a risk. Whether I am right or wrong in these views, I entertain no doubt that in many cases a knowledge of the pecuniary circumstances of a person desiring to be insured is material to the risk, as affecting, in some degree, the life; and they are a legitimate subject of inquiry for the examining physician or surgeon. This inquiry may not be material in every case, but the surgeon alone can tell whether it was or was not so in a given case. It is, therefore, competent to ask him whether he made the inquiry, and what response was given, and how far he deemed such answer material in deciding to advise the taking of the risk. In such cases the very point of inquiry is, whether the pecuniary circumstances were deemed by him material, and whether he would have advised the acceptance of the risk if it had not appeared that the person desiring to be insured was a man of means. This is the only inquiry by which the real importance of the inquiry and answers can be ascertained. For these reasons I think the learned justice who tried this cause erred in rejecting the question put to Dr. Staats, as to the effect upon his mind and action in respect to said application, and the judgment should for this reason be reversed."[1]

§ 51. In the case of Hogle *v.* Guardian Life Insurance Co.,[2] the Superior Court of New York City took a view of the scope of the medical examiners' duties somewhat similar to those taken by the Supreme Court. They say: "These misrepresentations are based upon a statement made by Warner to the company in his application, that he had never had any serious illness, except fever seven years before, and that the functions of the abdominal and urinary organs were properly performed. The last statement was made in answer to a question put by the examining physician. It can hardly be said, in regard to the last statement, that it

[1] But see Higbie v. Guardian Mut. L. Ins. Co. 2 Ins. Law Jour. 761; s. c. 8 Alb. Law Jour. 392.

[2] 6 Rob. 567; s. c. 4 Abb. N. S. 346.

was a misrepresentation, taking into account all the evidence in the case. The company did not rely upon what Warner told the doctor, but on the doctor's report, which is supposed to embody his opinion, not the patient's statements.[1] The defendants could have put the question and taken Warner's answers, but their object and design was to obtain a professional opinion. As such, his answers must be taken and regarded by us. It was the doctor's duty to make such personal examination of Warner as to satisfy himself, as he was answering to the defendants. This we must presume he did. He was in the defendants' employ, and was bound conscientiously, as he doubtless did, to discharge his trust. The doctor says (after describing his height and complexion), 'he had a healthy appearance, and was a well-preserved man of his age. If he had been feeble I should have remarked it, and should have examined as to its cause;' thus showing that the doctor did more than take his mere answers, and was satisfied to answer as he did. This statement must be referred to the general condition of the specified organs, not to occasional and temporary derangements of the system, which are common to all. The very next question is in a form which, if addressed by the doctor to Warner in regard to the point under consideration, would have elicited a history of any and all difficulties of the organs in question, showing that question ten was only intended to call for general information from the doctor by the company, and not the past and present history of the functions referred to. But it appears, as a matter of fact, that the doctor was told Warner had had colic, at this interview. It is difficult to see how the physician could have been misled in his opinion by the answers made to him by Warner, or the company in any way deceived." In so far as this decision may appear to be at variance with that of the Court of Appeals, in Valton's case, just cited, it is, of course, not law.

[1] This is hardly correct as applied to the present practice of insurers. The doctor's report usually contains statements which could only be obtained from the applicant, and also observations of his own, and gives his opinion formed from such statements and from the facts observed by him combined.

§ 52. **Rules in Fire and Life Insurance the same.**—What has been said hitherto proceeds upon the assumption that the rules which govern the doctrine of representation in fire insurance substantially apply to life insurance. And such is believed to be the correct doctrine, both upon principle and upon judicial decision. In life insurance the insurer is much more nearly in the position of the marine insurer than of the insurer against fire. In marine insurance, the reason given why a full and correct disclosure is required, is that the thing insured, the *corpus*, so to speak, is frequently not accessible to the insurer, and he must, from the nature of the case, rely upon the good faith of the insured. Such modifications of the strict rules applicable to marine insurance as have been made in fire insurance, have been avowedly based upon the fact that in fire insurance the thing insured was, as a general rule, capable of being examined by the insurer. In life insurance the insured can be, and ordinarily is, subjected to a medical examination, but there is a large amount of information, essential to a proper estimate of the risk, which no medical examination can furnish. Such information is that relating to the past history of the insured, to the health of his parents and other blood relations, and all the details which enable a judgment to be formed as to his constitutional and hereditary peculiarities. In principle, therefore, it is quite as essential that there should be a full, correct and unreserved disclosure in life insurance as in fire insurance.

In the judicial decisions no distinction upon this subject seems to have been taken, except in one or two recent cases, the chief of which is that of Wheelton v. Hardisty.[1] A question was there presented whether certain statements were warranties in such sense that, if not true, the policy was avoided. The form of the statements was so peculiar that the remarks of the court were perhaps not essential to the decision, but several of the judges took occasion to draw a marked distinction between marine and life insurance. Thus,

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[1] 8 E. & B. 232; s. c. 26 L. J. Q. B. 265; 3 Jur. N. S. 1169; 5 Jur. N. S. 14; 27 L. J. Q. B. 241.

Martin, B., says: "The cases cited for the defendants to show that the representation, whether fraudulent or not, if merely untrue, avoided the contract, failed to show that such a rule applied to life policies, unless the policy contained a direct provision that the truth of such representation was to be the basis of the policy." Crowder, J., says: "The defendants contend that one of those conditions was, that if the statements by the plaintiffs were untrue, the policy should be avoided. But the cases on which they relied were principally cases of marine policies, and none of the cases established that life policies are to be so construed, unless they contain an express condition to that effect. Here there is no such express condition, and we can give a reasonable interpretation to the policy without resorting to such a construction. We cannot strike out as a nullity the statement recited in the policy, but we may fairly consider it as a representation in writing, the untruth of which would avoid the policy, if the representation were false to the knowledge of the party claiming under the insurance, but not otherwise. It is clearly not a condition." Bramwell, B., says expressly: "Nor ought any rule to be drawn from the cases cited as to the construction of marine policies;" while Channing, B., says: "Some confusion appears to me to have been introduced during the argument, in the use of the word 'warranty.' The breach of a warranty does not avoid the contract unless the warranty amounts to a condition." Martin, B., however, seems to admit that if the policy had purported to be issued on the basis of the proposal, the statements would then have been warranties.

In the earlier case of Anderson v. Fitzgerald,[1] the Lord Chancellor said: "If the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bona fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bona fide* or not, if it is not material, the untruth is quite unimportant. If the man, on entering into the policy, had said

[1] 4 H. of Ld.'s Cases, 484; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1.

that he arrived at Dublin three days previously, whereas he had only arrived that morning, and such statement did not form part of the contract, then, though false, it would be quite immaterial. If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover."

These cases, it will be seen, say expressly that a misrepresentation as to an immaterial fact, whether made *bona fide* or not, does not avoid the policy; and that a misrepresentation of a material fact made without fraud has no effect; but in both cases the remarks were *obiter*. Some remarks of Lord Mansfield, in Ross v. Bradshaw,[1] and in Stackpole v. Simon,[2] if correctly reported, as to which some doubt has been expressed,[3] lend weight to these views.[4]

§ 53. The views thus expressed are, however, in their broad terms, inconsistent with the law as laid down in other cases. Thus, in Lindenau v. Desborough,[5] Lord Tenterden said: "I shall tell the jury that if any fact, in their opinion material for the information of the office respecting the state of the duke's health, and which was known to the party certifying, was concealed, then, in my opinion, the policy is void." Subsequently, on appeal, Bayley, J., approved this direction, saying: "Whether a policy be effected on a life or a ship, or against fire, the underwriter has a right to expect that everything material should be communicated to him."[6]

In Wainewright v. Bland,[7] it was held that, though the

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[1] 1 Blackst. 313; s. c. Marshall on Ins. 770.

[2] *Ante*, § 45.

[3] Phillips on Ins. § 643.

[4] See also Rawlins v. Desborough, 2 Mood. & Rob. 328, 333; Huckman v. Fernie, 3 M. & W. 505; Swete v. Fairlie, 6 C. & P. 1.

[5] 3 C. & P. 353; s. c. on motion for new trial, 8 B. & C. 586.

[6] The policy was what is known as an Atlas policy. Its terms do not appear in the original report, but are given in Hayes R. 419. The insurance was subject to the conditions indorsed on the policy, "as if the same were here actually repeated," and one of the conditions provided for persons "to be referred to respecting the present and general state of health of the life to be assured," and a declaration on these points was to be "the basis of the contract."

[7] 1 Mood & Rob. 481; s. c. 1 Tyrwh. & G. 417; 1 M. & W. 32.

policy, by its terms, was to be void if any written statement was wrong, it was nevertheless invalidated by a verbal misstatement as to a material fact; the misstatement was however intentional. In Huguenin v. Rayley,[1] the policy contained a clause not only against misrepresentation, but against reservation, but the case seems not to be rested upon that. In the case of Campbell v. New England Mutual Life Insurance Co.,[2] the court not only say that the principle upon which a representation forfeits a policy rests upon other considerations than those of fraud, but they hold that a representation, if materially untrue, avoids the policy, even if made ignorantly and in good faith, quoting cases of fire and marine insurance, and a passage from Arnould on Insurance, among others, as authorities. The same court, in Vose v. Eagle Life & Health Insurance Co.,[3] say: "But where there is no warranty, an untrue allegation of a material fact, or a concealment of a material fact, will avoid the policy, though such allegation or concealment be the result of accident or negligence, and not of design." In Lefavour v. Insurance Co.,[4] the court say: "There is no doubt that the concealment of a fact material to the risk avoids the contract, though there is no clause to that effect in the policy. There is no doubt that this is the law in life policies as well as in policies of marine insurance. Good faith is required on the part of the assured. He knows, and the underwriter is not presumed to know, whatever is material, and he is not confined to the warranties contained in the policy."

§ 54. The text-writers do not admit the doctrines apparently sanctioned by Wheelton v. Hardisty. Angell says,[5]

[1] 6 Taunt. 186. The fact was left unmentioned that the assured was in prison, and the court held that if the imprisonment was a material fact, it should have been stated, and that the question whether it was material should have been left to the jury.

[2] 98 Mass. 381.

[3] 6 Cush. 42. See Rawls v. Am. L. Ins. Co. 36 Barb. 357; affirmed 27 N. Y. 282. The case of Horn v. Amicable L. Ins. Co. 64 Barb. 81, seems to take a contrary view, but the passages in which this occurs are in effect overruled in Smith v. Ætna L. Ins. Co. 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116, and Higbie v. Guardian L. Ins. Co. 2 Ins. Law Jour. 761; s. c. 8 Alb. Law Jour. 392.

[4] 1 Philadelphia R. 558.

[5] § 175.

"All the authorities concerning matters of insurance concur in the position that if the concealment is material it will avoid the policy, notwithstanding the assured did not intend to commit any fraud. The *suppressio veri* may happen by mistake and be entirely without fraudulent intention, still the underwriter is deceived, and the policy is thus void; for the very plain reason that the risk run is really different from the risk understood and intended to be run at the time of the agreement. A concealment, which is only the effect of accident, inadvertance, or mistake, is equally fatal to the contract as if it were designed. The principle is that if the party proposing insurance conceals anything which may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy." By a material fact is meant one which, if communicated to the underwriter, would induce him either to decline an insurance altogether, or not to accept it unless at a high premium, or, as stated in Massachusetts,[1] "every fact must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium." "If a party, for instance, with knowledge that his agent is in treaty for insurance, receives information of a material fact, he is bound promptly to use the means of communicating it, and his neglect thus to do will avoid the policy, independently of any proof of bad motives for the delay." Angell, moreover, says,[2] that the rules upon warranty and representation are the same in life insurance as in fire insurance. Blaney says,[3] "The very essence of a contract of life insurance is in observing good faith and integrity and avoiding any representation that is not founded in truth, or concealment of any fact that may give either party an advantage

[1] Daniels v. Hudson Riv. (F.) Ins. Co. 12 Cush. 416.
[2] § 307.
[3] Life Insurance, 49.

over the other." Phillips says,[1] "There is not, that I am aware of, either authority or reason for the doctrine that a life policy, issued upon a misrepresentation, made through negligence or mistake, is valid, or that there is in this respect any distinction between a life policy and a marine one." While Bunyon says,[2] "In such representations all material facts must be substantially correct. And when the fact is material, as in the case of warranties, it is not the knowledge of the assured which is of importance, but the actual correctness of his statements; and if he has induced the insurers to enter into the contract, upon false premises, he of the two innocent parties must be the sufferer. * * If he leads the insurers into error, by inducing them to compute their risk upon circumstances not founded in fact, so that the risk actually run is different to that intended to be run, the contract is as much at an end as if there had been a wilful and false allegation or an undue concealment of circumstances."[3]

§ 55. **Courts lean against Warranties.**—The distinction between the effect of a warranty and a representation being so marked, it is always important to ascertain when a statement is a warranty and when merely a representation. While, of course, the intention of the parties, so far as it is manifested, is to govern, there are, in addition to the distinctions already pointed out, certain well-established rules. The courts lean in favor of the construction which makes a statement a representation rather than a warranty.[4] Warranties are not created or extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties. When therefore, from the desig-

[1] § 643. Mr. Phillips seems to have overlooked the passages cited from Wheelton v. Hardisty.

[2] P. 32.

[3] Cites Park, 442.

[4] Wheelton v. Hardisty, 8 E. & B. 232, 300; s. c. 3 Jur. N. S. 1169; 5 Ib. 14; 26 L. J. Q. B. 265; 27 Ib. 241; Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381; Wilkinson v. Conn. Mut. L. Ins. Co. 30 Iowa, 119; Daniels v. Hudson River (F.) Ins. Co. 12 Cush. 416, 424; Blood v. Howard F. Ins. Co. 12 Cush. 472; Jefferson (F.) Ins. Co. v. Cotheal, 7 Wend. 72, 80; Forbush v. Western Mass. (F.) Ins. Co. 4 Gray, 337, 341; Wilson v. Conway F. Ins. Co. 4 R. I. 141, 156.

nation of such statements as "statements" or as "representations," or from the form in which they are expressed, there appears to be no intention to give them the force and effect of warranties, or when the intention is doubtful, they will not be so construed.[1]

§ 56. **Warranties strictly Construed.**—A warranty is strictly construed as not extending beyond its precise terms,[2] though the terms must be taken according to their fair and obvious meaning.[3] Thus, where the assured covenanted that the application contained a just, full and true exposition of all the facts and circumstances, so far as the same were known to the applicant and were material to the risk, and the policy declared that the application was made part of it, and that it was "made and accepted upon the representations of the assured in his application," the statements made in the application were held to be warranties only so far as the facts stated "are known to the applicant and are material to the risk."[4] So in a case of life insurance, where the declaration, after affirming that certain particulars given in answer to questions "are correct and true throughout," and that the proposals and declarations should be the basis of the contract, continued: "And if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein," the policy—which provided that it should be forfeited "if any statement in the declaration was untrue,"—should be void, it was held that the policy was not avoided by a representation which proved false, it having been made *bona fide*, for both the declaration and policy must be read together to get at the intent.[5] Where

[1] Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381; Garcelon v. Hampden F. Ins. Co. 50 Me. 580; Wall v. Howard (F.) Ins. Co. 14 Barb. 383; U. S. Ins. Co. v. Kimberly, 34 Md. 224. See as to construction, *post*, chapter on Evidence.

[2] Sayles v. N. W. (F.) Ins. Co. 2 Curt. C. C. 610; Wilkinson v. Conn. Mut. L. Ins. Co. 30 Iowa, 119.

[3] Reynolds v. Comm. F. Ins. Co. 47 N. Y. 597; Higbie v. Guardian Mut. L. Ins. Co. 2 Ins. Law Jour. 761; s. c. 8 Alb. Law Jour. 392.

[4] Garcelon v. Hampden F. Ins. Co. 50 Me. 580.

[5] Fowkes v. Manch. & Lond. L. Ass. & Loan Ass. 3 B. & S. 917; c. s. 32 Law J. Q. B. 153; 11 Week. Rep. 622; 8 Law Times, N. S. 809.

it was provided that any "palpably fraudulent or untrue" statement should avoid the policy, it was held on demurrer that a plea that certain facts were stated, each of which "was untrue," was bad.[1] So an answer that the applicant had not had any symptoms of scrofula, "as he was aware of," was held not to be shown false by proof that he had had an abscess, which in fact was scrofulous, unless it was shown that he knew it was so.[2]

But where the application was preceded by a statement that "the policies of this company are made in entire, unconditional, honest good faith," and that it is expected "that the applications be made in good faith," and "the assurance can be jeopardized only by dishonesty or inexcusable carelessness on the part of the applicant," and that if the insured cannot answer "yes," or "no," he can properly say "I do not know," it was held to be "inexcusable carelessness, at least," to say "yes," or "no," untruly, and that the preliminary caution as to the importance of honesty and carefulness on the part of the applicant did not prevent the statements of the application from becoming absolute warranties when it was in the application expressly agreed that "the answers to the annexed questions are warranties," "that they form part of the contract or policy, and if not in all respects true, the policy shall be void."[3]

§ 57. In a recent American case[4] the policy stipulated that it should be void if any of the statements in the application should be found in any respect untrue; the application contained an instruction to the applicant to answer each question "to the best of his knowledge and belief, briefly but explicitly," and also a statement that answers made to the questions "shall form the basis of the contract for insurance,"

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[1] Guinane v. Hope Mut. L. Ass. & Hon. Guar. Soc. 7 Irish Jur. 52. "If the warranty is that the answer is true, it is a question of fact, not of knowledge. The word 'true' then is used, of course, in a general sense, and whether the man knows it to be true or false is utterly immaterial." Lord St. Leonards, in Anderson v. Fitzgerald, 4 H. of Ld.'s Cas. 484; s. c. 17 Jur. 995; 24 Eng. Law and Eq. 1.

[2] Swift v. Mass. Mut. L. Ins. Co. 2 N. Y. Supreme R.

[3] Fitch v. Am. Pop. L. Ins. Co. 2 N. Y. Supreme R. 247.

[4] Washington L. Ins. Co. v. Haney, 2 Ins. Law Jour. 283, Kansas.

and also that "any wilfully untrue or fraudulent answers shall avoid the policy." It was held that the measure of truthfulness required by the policy was that indicated in the application, and that a mere misstatement, unless wilful and fraudulent, would not avoid the policy. The court say: "We do not understand the clause, 'upon the faith of which this policy is issued,' as limiting this condition to a portion of the application, or any particular statements therein. It does not mean to imply that there are certain statements which must be true because the policy is based upon them, while others are immaterial. It means that the policy is issued upon the faith of the whole application, with all its statements and declarations, and that if any of them are untrue, the policy is avoided. We must therefore consider the application as a whole, and each party has a right to have it so considered. If the application propounds certain questions, and indicates in what manner they must be answered, it is enough that they are answered in that manner, and when the policy is based upon the statements and declarations of the application, it is based upon them made in the manner and under the rules laid down by the company in the application. If we turn now to the application, we find under the head 'Instructions in filling up this application,' 'First, answer each of the questions on the first page to the best of your knowledge and belief, briefly but explicitly,' and at the close of the questions and answers of the applicant, and just before her signature, is the following: 'It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the above statements shall form the basis of the contract for insurance, and also that any wilfully untrue or fraudulent answers, any suppression of facts in regard to the party's health, or neglect to pay the premium on or before the day it becomes due, will render the policy null and void, and forfeit all payments made thereon." While the policy for its validity requires truthfulness in the statements of the application, it is enough if they are true according to the

degree and conditions of truthfulness required by the application. This is all the parties meant when they spoke of truthfulness in the policy; to presume otherwise, and suppose that the company meant one degree of truthfulness in the application, and another in the policy, is to impute a dishonesty which the law will never presume, and if shown to exist, will never sustain."

In another case against the same company the court say,[1] that the validity of the policy depended entirely "upon the good faith of the assured in the representations which she made in regard to her health. If she answered the questions honestly, and did not wilfully and fraudulently suppress any facts in regard to her health, then the defendants are bound to make their insurance good, although Eurekia Randon may, at the time of the insurance have had an organic disease."

The cases in which the applicant avowedly states only his belief, or the information he has received, also show with what strictness a warranty is construed. The warranty is then only that he does in truth believe the fact he states, or has really received the information he gives. Where one company procured a re-insurance of the life of a third party on a proposal, stating "that the said association had thereupon undertaken the proposed assurance subject to the terms and conditions therein and thereunder expressed," and the proposal referred to answers made to another company and concluded "that we believe the above particulars and statements are true," it was held by the Exchequer Chamber, reversing the Queen's Bench, that there was no warranty of the truth of the matters recited in the policy to have been declared, nor anything showing an intention that the truth of these matters should be the basis of the contract.[2]

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[1] Scheible v. Washington L. Ins. Co. 6 Pacific Law Rep. 100.

[2] Wheelton v. Hardisty, 8 E. & B. 232; s. c. 3 Jur. N. S. 1169; 5 Ib. 14; 26 L. J. Q. B. 265; 27 Ib. 241. Where the statements were declared in the application to be true "so far as the same are known to the applicants," and it was held at the trial that as matter of law they must be presumed to know certain facts relating to property of which they were owners, on appeal it was decided that the question of knowledge ought to have been left to the jury. Houghton v. Manuf. Mut. F. Ins. Co. 8 Met. 114.

§ 58. Warranty need not appear on Face of Policy.—As already implied, it is by no means essential that a statement, in order to be a warranty should appear upon the face or in the body of the policy. It may be noted upon its margin or indorsed on the back of it, or annexed to it or contained in an entirely distinct paper, and yet it will become a warranty, providing fit words are used in the policy, showing such to be the intention of the parties. The cases are not entirely agreed as to what language is sufficient to import into the policy statements not contained in it, but it may be said that as a general rule, a mere reference to papers will not make them part of the policy in such sense as to make the statements contained in them warranties,[1] but that if the policy recites that the contract is made upon the faith of, or upon the basis of[2] certain papers, and still more if, as is usual, it describes them as forming a part of it,[3] or if it is declared to be subject to the provisions of the charter and by-laws,[4] the

[1] Snyder v. Farmers' Ins. & L. Co. 13 Wend. 92; Eddy Street Iron Foundry v. Hampden S. & M. F. Ins. Co. 1 Clif. 300; Wall v. Howard (F.) Ins. Co. 14 Barb. 383; affirmed in Ct. of Appeals, see 21 Barb. 157; Comm. (F.) Ins. v. Monninger, 18 Ind. 352; Jefferson (F.) Ins. Co. v. Cotheal, 7 Wend. 72; Burritt v. Saratoga Co. Mut. F. Ins. Co. 5 Hill, 188. But see Routledge v. Burrell, 1 H. Bl. 254, and Worsley v. Wood, 6 T. R. 710, in both of which the reference was "according to the terms of the printed proposals delivered with the policy," which words were held to make the agreements of the proposals part of the contract.

[2] Miles v. Conn. Mut. L. Ins. Co. 3 Gray, 580; Kelsey v. Univ. L. Ins. Co. 35 Conn. 225; Anderson v. Fitzgerald, 4 H. of Lds. Cas. 484; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1; Wash. L. Ins. Co. v. Haney, 2 Ins. Law Jour. 283, Kansas; Day v. Mut. Ben. L. Ins. Co. Sup. Ct. of Dist. of Col. 1 Washington Law Rep. 22; Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223; Wilkinson v. Conn. Mut. L. Ins. Co. 30 Iowa, 119; Brennan v. Security L. Ins. Co. 4 Daly, 296; South. L. Ins. Co. v. Booker, Supreme Court of Tenn. MSS.

[3] Jennings v. Chenango Co. Mut. (F.) Ins. Co. 2 Denio, 75; Burritt v. Saratoga Co. Mut. F. Ins. Co. 5 Hill, 188; Murphy v. People's Eq. Mut. F. Ins. Co. 7 Allen, 239; Gates v. Madison Co. Mut. (F.) Ins. Co. 2 Comst. 43; s. c. 1 Seld. 469; Egan v. Mut. (F.) Ins. Co. 5 Denio, 326; Battles v. York Co. Mut. F. Ins. Co. 41 Me. 208; Smith v. Bowditch Mut. F. Ins. Co. 6 Cush. 448; Smith v. Empire (F.) Ins. Co. 25 Barb. 497; Chaffee v. Cattaraugus Co. Mut. (F.) Ins. Co. 18 N. Y. 376; Ripley v. Ætna (F.) Ins. Co. 30 N. Y. 136; Shoemaker v. Glens Falls (F.) Ins. Co. 60 Barb. 84; France v. Ætna L. Ins. Co. U. S. Circuit, E. D. of Pa. 2 Ins. Law Jour. 657; Foot v. Ætna L. Ins. Co. 4 Daly, 285; Dewees v. Manhattan (F.) Ins. Co. 34 N. J. 244.

[4] Smith v. Bowditch Mut. F. Ins. Co. 6 Cush. 448. It is now provided in Massachusetts by statute (1864 c. 196, § 1) that "the conditions of the insurance shall be stated in

papers so referred to become, in legal signification, a part of the policy, and the statements contained in them are regarded in the same light as if they were contained in the policy itself, the papers and the policy being read together as one instrument.[1]

§ 59. **Other Papers referred to in the Policy.**—Where a memorandum was written in the margin of the policy, stating that it was conditioned on certain things being done, it was held that the memorandum must be treated as a part of the policy, and receive the same interpretation as if written in the body of it.[2] But where there was on the back of the policy—an accident policy—an indorsement showing the classification of the risks assumed by the company, and an explanatory statement, it was held[3] that it became part of the contract only so far as it was specifically referred to in the policy as constituting a part of it, and that a reference to the classification did not make the explanatory statement a part of the contract. Where the policy provided that it should be subject to the several conditions, instructions, and stipulations indorsed thereon in the same manner as if they had been incorporated in the body of the policy, it was

the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or part of the contract, except so far as they are incorporated in full in the policy, and so appear on its face."

[1] Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101.

[2] Patch v. Phœnix Mut. L. Ins. Co. 44 Vt. 481; s. c. 2 Ins. Law Jour. 36; Bean v. Stupart, Doug. 11.

[3] Stone v. U. S. Casualty Co. 34 N. J. 371. The court say: "But there is still another, and, as it seems to me, a decisive objection against the admission of this indorsement as constituting in itself a substantive agreement. That objection is this: That, considered in this light, it cannot be received as any part of the contract between these parties. As I have stated, this clause is a prefix to the classification on the back of the policy, and such prefix is not referred to in the body of the instrument. The policy itself is very explicit as to what shall be comprised in the contract. Its language is, that this policy is 'issued and accepted subject to all the provisions, conditions, limitations, and exceptions herein contained or referred to, and upon the express agreement that the statements and declarations of the insured in his application for this insurance are warranted to be true in all respects, and that said application, together with the company's classifications of hazards endorsed hereon, are referred to and made a part of this contract.' This specification of the parts going to make up the agreement is clear, and it does not embrace this prefix in question, if such prefix is to be taken as a modification of the body of the policy in a most material respect."

held[1] that a memorandum printed on the policy immediately after the signatures, the date and signature of the agent being written in, became a part of the policy, and that its provisions and those in the body of the policy upon the same subject must be construed together. But where at the time the application was made, and before the policy was issued, a receipt was given which contained a permit, it was held that such permit did not become a part of the policy, and that the policy could not be reformed so as to include it in its terms. Where the policy provided that it was "subject to the conditions and stipulations indorsed on the back of the policy, which constitute the basis of this insurance," and one of such conditions was that "the basis of this contract is the application," it was held[2] that the latter became a part of the contract. So where the policy on its face referred to the declaration, and the declaration referred to the particulars of the insured, given by him in answer to questions, these were held, as one instrument, to constitute the agreement of the parties.[3]

In Trench v. Chenango County Mutual Insurance Co.[4] the policy said, "reference being had to the application * * for a more particular description, and the conditions annexed as forming a part of this policy," and it was held to make the conditions but not the application a part of the policy. But in Bilbrough v. Metropolis Insurance Co.[5] the policy insured certain premises "as per plan No. 102 on file in this office, which is hereby made a part of this policy, and to be referred to in case of loss." These papers when produced proved to be a diagram and an application which were not objected to, but a third one, consisting of answers to questions, signed by the plaintiff and indorsed 102, and appearing to be an application to another company, was

[1] Rainsford v. Royal Ins. Co. 33 N. Y. Superior Court, 453; affirmed in Court of Appeals, 9 Albany Law Jour. 50.

[2] Bobbitt v. Liv. & Lond. & Gl. Ins. Co. 66 North Car. 70.

[3] Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101.

[4] 7 Hill, 122.

[5] 5 Duer, 587; see LeRoy v. Market F. Ins. Co. 45 N. Y. 80.

objected to. The application to the defendant had referred to "plan and survey No. 102 on file in the office of ——, which is made a part of this policy." It was held that all of the papers were sufficiently referred to. In Jefferson Insurance Co. v. Cotheal,[1] the court, after saying that the printed proposals attached to and accompanying the policy, referred to in it, and with reference to which the policy is expressly made form a part of it, add: "But no case has been given to the court, in which any other document has been held to have been so incorporated into the policy by reference as to give to its contents the effect of a warranty or a condition precedent on the part of the assured," and where the reference in the policy said, "as described in report No. 193," and a report so numbered was produced, attached by a wafer to an application, and being in the handwriting of an officer of the company, and there was evidence that the report was not originally so attached, it was held that the application was not so referred to as to make its statements warranties.

In Bennett v. Anderson[2] the policy provided that if anything stated "in the declaration or attestation therein before mentioned" should be false, &c., and at the foot of the proposal was a covenant "that the proposal mentioned in the above policy shall form the basis of the contract." The Irish Queen's Bench were divided on the question whether this language made the statements of the proposals warranties or not, but all agreed that they were either warranties or representations made conclusively material. It has been held that a paper purporting to be conditions annexed to and delivered with the policy *prima facie* forms a part of it, though it may be shown by parol that it was not so intended.[3] But by-laws printed on the back of a policy are not part of it.[4]

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[1] 7 Wend. 72. So in much earlier cases; Pawson v. Barnevelt, Doug. 13, n.; Pawson v. Watson, Cowp. 785. But see Gillen v. Thornton, 3 E. & B. 868.

[2] 1 Irish Jurist, 245.

[3] Roberts v. Chenango Co. Mut. (F.) Ins. Co. 3 Hill, 501; Murdock v. Chenango Co. Mut. (F.) Ins. Co. 2 Comst. 210. But see Bize v. Fletcher, Doug. 13, n.

[4] Kingsley v. N. E. Mut. F. Ins. Co. 8 Cush. 393.

In mutual companies the rules and regulations are frequently referred to in the policy, and, both because the reference usually makes the rules a part of the contract, and because the insured becomes, by the act of insurance, a member, and bound to observe the by-laws, the latter will become warranties.[1]

§ 60. In Sceales v. Scanlan[2] the Irish Exchequer Chamber decided a question of construction with great elaborateness. The policy commenced by reciting that the assured had proposed to effect a policy on his life, and had deposited with the company a declaration "which, being set forth as the strict statement of facts, was received as the basis and condition of the contract, setting forth" certain specified items of the declaration as to his age, health and habits, and concluding with a proviso "that in case any untrue or fraudulent allegation be contained in the said declaration, * * or that any information respecting the past health or habits of the party assured, or other circumstance important for the directors to know, shall have been withheld from them, * * * or in case any of the nullities specified in the conditions hereunto annexed, as well as in the original proposal, then, and in every such case this policy shall be null and void." There was a false statement, or concealment, as to his medical attendant, innocently made, and the question was whether that was a warranty or misrepresentation. The representatives of the assured claimed that those matters in his declaration which were specially set forth in the policy were alone to be taken as warranties, but the court held that all the matters contained in the proposal and declaration referred to in the policy, whether such matters were specially set out in it or not, were warranties; in other words, that the enumeration of part in the policy did not make the others not enumerated mere representations, and that therefore, though a statement as to the medical attendant was not one of those

[1] Holmes v. Charlestown Mut. F. Ins. Co. 10 Met. 211; Towne v. Fitchburg Mut. F. Ins. Co. 7 Allen, 51. See chapter on Mutual Companies, *post*.

[2] 6 Irish Law R. 367; s. c. below, 5 Ib. 139.

set forth in the policy, still it was a warranty, and not, having been true, avoided the policy, though the jury found that the fact suppressed was neither fraudulently withheld nor important for the company to know.

§ 61. Where the policy stated that it was issued upon statements made upon a certain day, statements made subsequently but before the policy was issued, by a person referred to by the applicant, were held not to be warranties, though they might have influenced the company in issuing the policy.[1] The court say: "The exception to that part of the charge, in which the jury were instructed that the statement of Marsh was not a warranty, was not well taken. This statement was not so referred to in the policy as to become a part of it, or be made a warranty. The policy, in terms, states that it was issued upon the faith of certain statements and representations, dated July 15th, 1853, and on file, respecting the life, health, and medical history of Fish. These were the statements of Fish and Dr. Shipman. Marsh's statement was made on the 16th July, 1853, and there was no reference to it in the application of Fish, nor did either Fish or the plaintiff procure it to be made, or know anything of the contents of the paper. It seems that it was a rule of the company to require of the person applying for insurance a reference to some third person, from whom information might be obtained respecting his general health and habits of life. In this case Fish referred to Marsh; and Holmes, the agent of the company, procured the statement of the latter and forwarded it, with the other papers, to the office in Connecticut. The statement was not made as a part of the application of Fish or the plaintiff, nor was such application based upon it. It not being furnished by the plaintiff or Fish, nor the application based upon it, it was not their statement, and hence not their warranty. A statement which the plaintiff did not furnish or rely upon, and of the nature of which he had no knowledge, cannot be converted by the de-

[1] Rawls v. Am. Mut. L. Ins. Co. 27 N. Y. 282.

fendants into a warranty to defeat the policy, although they may have been, to some extent, influenced by such statement in issuing it. The court went quite far enough in instructing the jury, in substance, that as Marsh had been referred to as an acquaintance of Fish, the plaintiff would be responsible for the truth and honesty of his statements; and if, in point of fact, they were untrue, whether such untruth originated in fraud, or mere negligence or want of recollection, it would avoid the policy."

But where the policy contained a proviso that it should be void if anything set forth in the written statement signed by the assured should be found untrue, it was held that the insurers were discharged by the insured having misrepresented a material fact, although such misrepresentation was made verbally, and did not form part of the written statement.[1]

Where the policy numbered 127, referred to the "assured's application No. 127, which is his warranty and a part hereof," and no written application was made, it was held that the reference could not be held to be to merely verbal statements;[2] and when the policy refers to a "written application," and none was in fact made, it is to be construed as if no such reference was contained in it.[3]

Where a policy has been allowed to lapse, and by arrangement with the company the lapse is waived and the contract renewed, it is subject to the conditions of the original application.[4]

Where the application is made a part of the policy, it would seem that on the trial the one cannot be introduced without the other.[5]

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[1] Wainewright v. Bland, 1 Mood. & Rob. 481; s. c. 1 M. & W. 32; 1 Tyrw. & G. 417.

[2] Newman v. Springfield F. & M. Ins. Co. 2 Ins. Law Jour. 682, Minn.

[3] Clinton v. Hope (F.) Ins. Co. 1 Ins. Law Jour. 436, N. Y.

[4] Day v. Mut. Ben. L. Ins. Co. Supreme Ct. of Dist. of Col. 1 Washington Law Rep. 22. But see Brady v. N. W. (F.) Ins. Co. 11 Mich. 425; N. E. F. & M. Ins. Co. v. Wetmore, 32 Ill. 221; Baltimore F. Ins. Co. v. McGowan, 16 Md. 47.

[5] Lycoming Mut. (F.) Ins. Co. v. Sailer, 67 Penn. 108. In Drullard v. Am. Pop. L. Ins. Co. MSS., the Superior Court of Buffalo held that this effect resulted from a policy which provided that it was issued in consideration of the statements contained in the application.

§ 62. **Effect of Reference to other Papers.**—The effect of importing into the body of the policy by reference a paper other than the policy, or an indorsement upon the policy itself, is that they are to be construed together, and that *prima facie* the statements so introduced become warranties; but the courts—especially those of Massachusetts—seize upon very slight indications to infer an intention to make such statements representations rather than warranties. Sometimes the reference itself limits the purposes of the reference. Thus where the policy purported to be "made and accepted in reference to the conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto," such conditions were held not to be warranties.[1] In Snyder v. Farmers' Insurance & Loan Co.,[2] the policy said, "more particularly described in application and survey furnished by himself, filed No. 928 in the office," and these words were held not to make the papers part of the policy, and therefore not warranties. So where the application was comprised in five papers, headed respectively: "Particulars required from the persons proposing to affect assurance on lives in this company;" "Questions to be answered by the physician of the party applying for insurance;" "Questions to be answered by the friend of the party applying for assurance;" "Questions to be answered by the agent, if the applicant is not personally known to him;" "Declaration to be made and signed by a person proposing to make an assurance on the life of another;" and the policy contained the following clauses: "or if the statements made by, or on behalf of, or with the knowledge of the said assured to the company, as the basis of, or in the negotiation for this contract, shall be found in any respect untrue, then, and in each of said cases, this policy shall be null and void," "and it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the declaration made by or for the assured, and bearing date the 19th day of February, 1866, and upon the faith of which this

[1] Eclipse (F.) Ins. Co. v. Schoemer, 2 Cincin. 474.

[2] 13 Wend. 92.

agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void;" it was held,[1] "that only the statements contained in the declaration could be regarded as warranties, and that the answers of the insured to the questions propounded to him were mere representations."

§ 63. **Rule in Massachusetts.**—In Massachusetts the effect of a reference to other papers is more narrowly construed. Where the policy was expressed to be "upon the following conditions," that "if the statements made by, or in behalf of, or with the knowledge of the said assured, to said company, as the basis of, or in the negotiations for this contract, shall be found in any respect untrue," then the policy shall be null and void; the court say,[2] "If they are contained in a separate paper, referred to in such a manner as to make it a part of the contract, the same considerations of course will apply. But if the reference appears to be for a special purpose, and not with a view to import the separate paper into the policy as a part of the contract, the statements it contains will not thereby be changed from representations into warranties. * * The application is, in itself, collateral merely to the contract of insurance. Its statements, whether of facts or agreements, belong to the class of 'representations.' They are to be so construed, unless converted into warranties by force of a reference to them in the policy, and a clear purpose manifest in the papers thus connected that the whole shall form one entire contract. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated to make it part of the policy, it will not be so treated. In Daniels v. Hudson River Insurance Co.,[3] the court (Shaw, C. J.)

[1] Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins. Law Jour. 25.

[2] Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381. See Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223.

[3] 12 Cush. 416, 423. In this case the clause was, "And this policy is made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for." This was held not to refer to the applica-

say, 'If by any words of reference the stipulations in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy.' In every case cited in support of the defendants' position there was an express reference in the policy, which made the application a part of the contract. The one most relied on, and claimed to be especially applicable to the facts of the present case, is that of Miles v. Connecticut Insurance Co.[1] In that case it was declared in the policy itself to be expressly 'understood and agreed to be the true intent and meaning hereof that, if the proposal, answer and declaration made by 'the assured,' and upon the faith of which this agreement is made, shall be found in any respect untrue, then and in such case this policy shall be null and void.' In that proposal the assured declare (among other things) that the answers and statements therein made are correct and true, and 'agree that the answers given to the following questions, and the accompanying statements, and this declaration, shall be the basis and form part of the contract or policy between them and the said company.' Two marked features in that case distinguish it from the present. First, the clause in the policy relates distinctly and exclusively to the paper called the 'proposal, answer, and declaration.' Second, when the two papers are thus brought together there is a distinct agreement, not only that the statements are true and correct, but that they are to form a

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tion or answers accompanying it, but to have "none of the characteristics of a warranty, because it is not in its own terms, or by reference to the terms and conditions annexed, an absolute stipulation for the truth of any existing fact, or for the adoption of any precise course of conduct for the future, making the truth of such facts, or a compliance with such stipulations, a condition precedent to the validity of the contract or the right of the assured to recover on it. * * The policy is made in reference to the terms and conditions annexed, but these are referred to not as conditions precedent. * * They are not to control or alter any express provision in the contract, or become parts of the policy; but they are statements in a collateral document which both parties agree to as an authoritative exposition of what they both understand as to the facts, on the assumption and truth of which they contend, and the relations in which they stand to each other." The court, therefore, held them representations only.

[1] 3 Gray, 580.

part of the contract. In the present case the policy contains no reference to any application, nor to any declaration or statement in writing made, or to be made, by the assured. The only clause in the policy which can have any bearing upon the question, when disconnected from other provisions of a diverse character, reads as follows, namely: 'Or if the statements made by, or in behalf of, or with the knowledge of the said assured to said company, as the basis of, or in the negotiations for this contract, shall be found in any respect untrue,' 'then, and in each of said cases, this policy shall be null and void.' It is clear that this is not a reference to any particular instrument or paper; but it includes any and all statements, whether oral or written. The defendant, however, contends that a written application having been made in this case, which by its own terms declares the statements therein contained to be made 'as the basis of' the insurance applied for, the policy will attach to that application as containing the 'statements' referred to, and thus constitute an express warranty. We are far from being ready to concede that the reference is sufficiently definite to warrant the bringing of the two papers together for the purpose of giving a construction to the contract. But even if the application may properly be resorted to for aid in the construction, it contains no agreement and no words to indicate that its statements are to be taken as warranties; nor that they are to form part of the contract. The designation of 'statements,' both in the application and in the policy, comports with the idea of representations rather than of warranties. Representations are 'the basis of' the contract of insurance; and such these 'statements' are declared to be. The effect, which is to result from their untruth results also from the untruth of representations. It is true that misrepresentations defeat a policy without any provisions to that effect in the policy itself. But the insertion of such a provision does not therefore require a construction which shall give them a different force or character. The disjunctive enumeration of the various conditions, under which misstatements

should render the policy void, indicates a sufficient reason for inserting the clause, if they are to be regarded as representations only. But it seems wholly inconsistent with an intent to create warranties. Upon that supposition, the clause can take effect as intended only in case a written statement is made, and must fail as to all other statements; or else it must be construed to bear a double aspect. There is nothing in the clause, or elsewhere in the policy, to indicate that statements in writing were intended to be put upon any different footing from oral statements made in the course of the negotiations leading to the contract. It seems to us, therefore, to accord best with the form and apparent purpose of this clause to construe all statements so made, whether oral or written, as representations. The clause in the policy is in the form of a condition, and is grouped with other provisions of various character and purpose under the general head of 'conditions.' But the use of the term 'conditions' does not always carry the legal consequences which attach to that word in its technical meaning. The clause must be taken as a part of the contract, and must have such an application as its fair interpretation, with the other parts of the contract, requires; but neither the form, nor the subject-matter, nor its associate provisions under the head of 'conditions,' indicate that it was intended to give to this clause the technical character of a warranty, or a condition precedent. The plaintiff is not bound to go beyond the written policy, and show what statements were made in order to prove that they were true. The burden is upon the defendant, notwithstanding this proviso is written in the policy in the form of a condition, to set forth and establish the facts relied upon to defeat the contract upon that ground. By statements 'in any respect untrue' must be intended statements made and received as inducement to the contract; that is, material and proper to be disclosed to the insurers to enable them to estimate the risk proposed, and determine upon the propriety of entering into the contract."[1]

[1] This case is approved in Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins.

§ 64. In any Event Statements referred to are prima facie Material.—Even, however, when the reference to the statements of the insured is not in such terms as to make them warranties, as when they are expressly referred to as representations, it will still be *prima facie*, if not conclusive, evidence of their materiality to the risk, and render any misrepresentation, or concealment in making them, fatal to the right of recovery.[1] As stated in Campbell v. New England Mutual Life Insurance Co.,[2] "It is true that a representation need not, like a warranty, be strictly and literally complied with, but only substantially and in those particulars which are material to be disclosed to the insurers to enable them to determine whether they will enter into the contract; and that, where the question of the materiality of such particulars depends upon circumstances, and not upon the construction of any writing, it is a question of fact to be determined by the jury. But where the representations, upon which the contract of insurance is based, are in writing, their interpretation, like that of other written instruments, belongs to the court; and the parties may, by the frame and contents of the papers, either by putting representations as to the quality, history, or relations of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material; and, when they have done so, the applicant for insurance cannot afterwards be permitted to show that a fact, which the parties have thus declared material to be truly stated to the insurers, was in fact immaterial, and thereby escape from the consequences of making a false answer to

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Law Jour. 25, and expressly adopted in Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223; see Glendale Woolen Co. v. Prot. (F.) Ins. Co. 21 Conn. 19.

[1] Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223; Mut. Ben. L. Ins. Co. v. Wise, 34 Md. 582; s. c. 1 Ins. Law Jour. 430; Horn v. Amicable Life Ins. Co. 64 Barb. 82; Eddy Street Iron Foundry v. Hampden S. & Mut. F. Ins. Co. 1 Cliff. 300; Houghton v. Man. Mut. F. Ins. Co. 8 Met. 114; Burritt v. Saratoga Mut. F. Ins. Co. 5 Hill, 188; Glendale Woolen Co. v. Prot. (F.) Ins. Co. 21 Conn. 19.

[2] 98 Mass. 381.

such a question."[1] This doctrine is pushed still further in a case in Maryland, where it was agreed in the application that the answers of the insured and his friend and physician should be the basis of the contract, and that if any untrue or fraudulent allegation should be contained in the answer or in the declaration, all premiums paid should be forfeited, and the policy declared that it should be forfeited if the declaration upon the faith of which the agreement was made was in any respect untrue. It was held[2] that the answers were not warranties, but representations made material by the agreement of the parties, and therefore that their truth alone was open to the consideration of the jury, that it was not incumbent upon the insurer to show that the answers were morally false, but that, if they were shown to be simply untrue, it would be sufficient to defeat the plaintiff's action.

§ 65. **Definition of Concealment.**—Concealment is the suppression of a material fact within the knowledge of either party, which the other has not the means of knowing, or is not presumed to know, and it avoids the policy, whether the suppression arises from fraud or from mistake, negligence, or accident. If the insurer has been deceived, it makes no difference that the insured had no intention to deceive him; nor does it make any difference that the loss occurs from a matter entirely unconnected with the thing concealed.[3] Concealment is the designed and intentional withholding of any material fact which the assured in honesty and good faith ought to communicate to the underwriter.[4] Lord Lyndhurst said in one case: You use the word "concealment; I do not choose to use that word, as it may import fraud," and he adopts instead the phrase "the mere non-communication of facts which, in the opinion of the jury, were material."[5]

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[1] Shoemaker v. Glens Falls (F.) Ins. Co. 60 Barb. 84; Bobbitt v. Liv. Lond. & Gl. Ins. Co. 66 North Car. 70.

[2] Mut. Ben. L. Ins. Co. v. Wise, 34 Md. 582; s. c. 1 Ins. Law Jour. 430.

[3] Arnould, § 199. The same observations apply here, as have already been made with reference to representation. *Ante*, § 52.

[4] Daniels v. Hudson Riv. F. Ins. Co. 12 Cush. 416, 425.

[5] Swete v. Fairlie, 6 C. & P. 1. The remark is given by Sir J. Scarlett, *arguendo* in

§ 66. **Effect of Concealment.**—If, therefore, one party, whether purposely or through negligence, mistake, inadvertence or oversight, omits to communicate a fact which he is bound to communicate, the other is wholly exonerated from the contract.[1] It is true of concealment as of misrepresentation,[2] that if it proceeds from fraud it avoids the policy, whether material or not, and the fraud precludes all inquiry as to materiality; but if there is no fraud, then the concealment must be of a material circumstance, and the test of materiality in concealment is in all respects the same as in misrepresentation.[3] It is, however, of course essential that the assured should have known the fact concealed, or was bound to know it,[4] but if he purposely neglects to learn material facts it is a concealment.[5] Baron Rolfe states the law of concealment as follows:[6] "A party is required not only to state all matters within his knowledge which he believes to be material to the question of insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy." The maxim *caveat emptor* has no application. There must be an entire disclosure of all material facts known to the assured. It is a question for the jury whether the fact concealed was material, and upon this question it makes no difference that the assured thought it was not material if it really was so.[7]

Swete v. Fairlie, as being contained in Williams v. Duckett, but does not appear in Duckett v. Williams, as reported in 2 Crom. & Mees. 348, nor in 4 Tyrw. 240.

May defines insurance (§ 200) concealment as a "lack of fullness," "the designed and intentional withholding of some fact material to the risk, which the insured in honesty and good faith ought to communicate to the insurer."

[1] Phillips, § 537; Bunyon, 29. [2] *Ante*, § 40. [3] Bunyon, 30.

[4] "The rule so expressed would seem to imply knowledge; how else can there be concealment?" Campbell, Ch. J., in Wheelton v. Hardisty, 8 E. & B. 255; see Mut. Ben. L. Ins. Co. v. Wise, 34 Md. 582; s. c. 1 Ins. Law Jour. 430.

[5] Phillips, § 548.

[6] Dalglish v. Jarvie, 2 Mac. & Gor. 243, a case of marine insurance.

[7] In Lindenau v. Desborough, 3 C. & P. 353, where it was argued that it

§ 67. Abbott v. Howard,[1] is a very elaborate Irish case upon misrepesentation and concealment, in which the application and answers were made the basis of the contract, and it was held that, as to concealment, it is immaterial whether the facts were withheld by fraudulent design or innocent omissions, and therefore the question to be submitted

concealment of a material fact to omit mention of a periodical catarr h and some mental weakness, Lord Tenterden said it was for the jury to say whether these omissions were material concealments. In the same case as reported 8 B. & C. 586, Bayley, J., says: "I think that in all cases of insurance, whether on ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured, and that the proper question is, Whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it to be material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach." And in the same case, Littledale, J., says: "In cases of life insurance, certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which, had they been known, would no doubt have been made the subject of specific inquiries. The general question appears to have been proposed in order to meet such cases, and I think the question on such a policy is not whether a certain individual thought a particular fact material, but whether it was in truth material, and of that the jury are by law constituted the judges." In Rawlins v. Desborough, 2 Mood. & Rob. 328, the question litigated was as to the habits of the insured, and whether there had been a material concealment. The evidence was conflicting, but the jury found against the company. Lord Denman said: "That it was the duty of a party effecting an insurance to communicate to the insurers every material fact within his knowledge tending to increase the hazard or to affect the question of the life being an eligible or proper object of insurance;" that the life insured "is to answer all questions put to him, and if he answers them falsely, that will vitiate the policy; or even, if without being distinctly interrogated as to his habits, the jury thought that he was aware of them, and knowing their importance studiously concealed them from the insurers," they were to find for the defendant. "But the mere non-communication of his habits of life by the party whose life was insured, would not in itself vitiate the insurance, even though those habits were, in the opinion of the jury, such as tended to shorten life." He "did not conceive the true meaning to be, that the party, whose life was to be insured, was bound to volunteer a statement of every circumstance that anybody might afterwards think was likely to affect the risk of his life. The real intention was, that he should submit himself to a full examination and inquiry, that he is bound to state nothing untruly, and that he is bound to answer all questions truly. If he decline to answer, the office may act upon his refusal, and if he answers untruly, he shall gain no benefit from such false statement." In Wainewright v. Bland, 1 Mood. & Rob. 481, a concealment as to the amount of other insurance and the object of obtaining a policy, were held material by the jury, and their verdict was sustained. See Jones v. Prov. Ins. Co. 3 C. B. N. S. 65, 86; s. c. 3 Jur. N. S. 1004; 2 L. J. C. P. 272.

[1] Hayes, 381. The opinions in this case contain an elaborate critical examination of prior cases upon concealment, and state some facts not found in the reports of such cases.

to the jury, was as to the materiality of the fact not mentioned. Joy, C. B., says: "The question is then, Has this insurance company been fairly dealt with, and has no fact been withheld from them which they were entitled to know? If it be the law that they ought to have been informed of every material fact, is it not difficult to believe that the tumor was not a material fact? But I take the law to be this, as to the facts and circumstances not provided for by the written instrument, they may or may not be material; but if they be material they ought to be communicated to the company. * * It has been argued here that the parties are bound by the terms of the policy, that they cannot travel out of them, and that a written contract cannot be varied by any matter *dehors* it. * * The defendants * * seek not to vary, but to annul the contract, on the ground that, by this fraudulent concealment, it would be inequitable to enforce it." After citing Huguenin v. Rayley,[1] he continues: "That case shows as clear as light that although the party did not omit to answer anything to which he was interrogated, yet if anything material were in his knowledge and not communicated, the suppression would be fatal."

§ 68. In the case last referred to,[2] it was required that there should be a declaration as to the health of the assured, and it was provided that the policy should be rendered void if there was any misrepresentation or reservation; the assured was described as a resident of a place named. In point of fact, she was then a prisoner in the county jail at that place. The court held that, though there was nothing express in the policy which required the imprisonment to be stated, nor was there any omission of any matter which the company called for, yet if the imprisonment were a material fact, the keeping it back would be fatal, and it was for the jury to say whether it was material.

§ 69. **How Non-disclosure may be Excused.**—The insurer may, however, in any particular case, limit his right to in-

[1] 6 Taunt. 186.

[2] Huguenin v. Rayley, 6 Taunt. 186.

formation, not only to facts which are within the knowledge of the assured, but to facts the materiality of which is within his knowledge, and therefore where the statement was that the applicant was not aware of any disorder or circumstances tending to shorten life, it was held,[1] that the company must prove, not only that such disorder existed, but that the applicant was aware that such was its tendency.

§ 70. Where it was provided in the application for a policy on the life of a third person that if there was any misrepresentation as the state of health it should vitiate the policy, such a policy on a person who, at the time of insurance, was in a good state of health, was not vitiated by the non-communication by such person of the fact of his having, a few years before, been afflicted with a disorder tending to shorten life, because it appeared that the disorder was of such a character as to prevent the person from being conscious of what had happened to him while suffering under it. Denman, Ch. J.,[2] in summing up, said that the jury were to find not only whether the facts were truly represented, but whether the person knew the state of health in which he had been, so that he could answer properly, and the jury having found that the insured, from insanity, was not aware of what had taken place, and could not therefore communicate it to the insurer, a verdict was rendered against the company.

§ 71. It seems also to be held, in some cases, that the form of application, in which detailed questions are asked and answered, is an implied waiver of the right to information upon matters not inquired about. Thus, it is held in New York that if the insured answers truly all questions put to him without evasion or concealment, it is enough, and it is not necessary for him to make any statement in regard to a habit not called for by any general or specific question, and the omission so to do is not such a concealment as avoids

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[1] Jones v. Provincial (L.) Ins. Co. 3 C. B. N. S. 65; s. c. 3 Jur. N. S. 1004; 26 L. J. C. P. 272.

[2] Swete v. Fairlie, 6 C. & P. 1.

the policy.[1] The Court of Appeals say:[2] "The only remaining branch of the charge singled out for exception was the instruction, 'that if Fish answered frankly and truly all the questions put to him, then there was no concealment. The mere omission to state matter not called for by any specific or general question, would not be a concealment, and would not affect the validity of the policy.' This was not wrong. It may be conceded that if the applicant, when a specific or even general question is put to him, which would elicit a fact material to the risk, untruly stated or concealed the fact, it would vitiate the policy; but I know of no case, in the law of life or fire insurance, in which the insurers, having framed and put to the insured, and having had fully answered by him, a series of questions calling for such information as they desired, touching the subject insured, have been discharged from their contract, because the insured did not go farther, and state what was not called for in the interrogatories. As was said by the learned judge in the court below: 'The presumption is, that the insurers questioned the party, upon all subjects which they deemed material, and all which were in contemplation of the parties at the time, and beyond that, clearly, a party is not bound to disclose.'" Another judge says: "If the defendants desired more information respecting the habits of Fish, they should have asked him more specific questions. He was not bound to inform them, whether he ate or drank much or little, or how often he did either, for the reason he was not interrogated as to such habits, and he could not have supposed the defendants desired information respecting the same, and therefore, was not guilty of a fraudulent concealment in the omission to give it."

§ 72. **Answers must be Full.**—But if a general question is put, calling for any fact with which the insurers ought to be made acquainted, as is ordinarily the case, a concealment

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[1] Rawls v. Am. Mut. L. Ins. Co. 36 Barb. 357; s. c. 27 N. Y. 282.

[2] 27 N. Y. 282.

of a material fact will avoid the policy, though such concealment be the result of accident or negligence and not of design, and though all specific questions be fully answered, for "it is the duty of the insured to disclose all material facts within his knowledge. Although specific questions, applicable to all men, are proposed by the insurers, yet there may be particular circumstances, affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers at the time of effecting the policy, which would elicit that fact, will vitiate the policy."[1] In Lindenau v. Desborough,[2] Lord Tenterden says: "Among the questions put by the office to the physicians, I find this: 'Are there any other circumstances within your knowledge which the directors ought to be acquainted with?' Now this question calls for a statement of everything that any one could think material." The answers to questions, whether special or general, must be full and fair, giving the whole truth. An answer which is technically true, may be in point of fact more deceptive than a direct falsehood. Thus a person when asked how old he is, may state in answer a number of years less than his true age, and defeat the entire object of the inquiry.[3] In Fowkes v. Manchester and London Life Insurance Co. the insured, in reply to a question: "Has the life been offered at any other office; and if so, has it been accepted, and at what rates?" answered, "It has been offered and accepted at the ordinary rates." The fact was that he had proposed his life for insurance to one office, which had declined it, and had proposed it to another, where he had been examined by one of their medical officers, and pronounced a fair insurable life. Cockburn, C. J., in leaving the case to the jury, said: "It is said on the part of the plaintiffs,

[1] Vose v. Eagle L. & Health Ins. Co. 6 Cush. 42.

[2] 3 C. & P. 353; s. c. 8 B. & C. 586; 3 Man. & Ry. 45.

[3] Cazenove v. Brit. Eq. Ass. Co. 6 C. B. N. S. 437; Perrins v. Mar. & Gen. Trav. Ins. Soc. 2 El. & El. 317; Huguenin v. Rayley, 6 Taunt. 186; Smith v. Ætna L. Ins. Co. 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116; Burritt v. Saratoga Co. Mut. F. Ins. Co. 5 Hill, 186, 191. The facts in many of the cases referred to in this chapter are stated in full in another connection in the next chapter.

that the deceased had been proposed to two other offices, and had been accepted at one and declined at the other. Even if this were so, however, did the deceased answer truly in stating simply that he had been accepted? Was the question asked him answered fairly and fully, according to its obvious meaning and effect? I rather think not; but that is for you. Is it, however, the fact that he had been accepted at either office? The office had not accepted him; all that appears is that one of the medical officers had examined him and pronounced his life fairly insurable. The answer appears to imply that he had been accepted by the *office*, for that is the obvious meaning of the question. That, however, is for you." The jury found that the answer was untrue, but not designedly so, and it was subsequently held that under the language of the policy, the misstatements must be wilful to vitiate it.

In a recent case[1] it appeared that in response to an inquiry whether the life had been proposed to or declined by any other office, and if so its name, the applicant replied that he had been and still was corresponding with other offices, as the amount to be insured was large. In fact, the life had, prior to that time, been refused by eight offices, and before the policy was issued, it was refused by eight more. It had been accepted by one. Malins, V. C., said: If he knew he had already been refused by eight other offices, what justification had he for the answer he gave? Did it not imply that he had not been refused? In order to tell a falsehood it was not always necessary to use express words, it might be done by implication. He must assume that even had he named only one office by whom the life had been refused, this office would have required the cause of such refusal. This showed the necessity for fair and open dealing. Did not this gentleman's answer mean that he had not been refused, but was still in correspondence, as the amount was large. On what principle could he have sent such an answer? For some time he had been rather impressed with the idea that there was

[1] In re Gen. Prov. L. Ins. Co. 18 Week. Rep. 396.

enough here to put the office on its guard. He now thought this had been written to avoid the truth. The eagerness of this office to get premiums was no excuse to the other side for suppressing the truth. He was bound to conclude, that there was here suppression, and intentional suppression of facts which, if known to the office, would have prevented them granting the policy. The suppression vitiated the contract. Bennet v. Anderson[1] was a similar case. To the question whether the life "had been accepted or refused at any other office, and if accepted, was it at the usual premium, or with what addition?" the answer was "Asylum and National Office at the usual premium," no mention being made of the fact that he had been refused by two other offices.

Where the question called for a statement as to his "vocation," what it then was and what it had been, and the answer was "traveling agent," which was true at that time, but was not true as to his past vocation, as he had been a painter and a soldier, it was held[2] that it was false "from the clear and manifest failure to tell the whole truth." And in the same case, the answer to a question where he had been since his birth, was "New York," which was true, but he had also been in Virginia in the army, and this was held fatal to the policy.

Where both in the application and the policy it was warranted that the answers to questions and the statements made were full, correct and true, and that no circumstance was concealed, withheld, or unmentioned in relation to the past or present state of health, habits of life, or condition of the said party whose life was assured, which might render an insurance on his life more than usually hazardous, or which might affect unfavorably his prospects of life," it was held[3] that a distinction was to be taken between untruthful answers to specific questions and the mere failure to make full answers. Such failure, under these provisions, to defeat

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[1] 1 Irish Jurist, 245. [2] Fitch v. Am. Pop. L. Ins. Co. 2 N. Y. Supreme R. 217.

[3] Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415. To same effect, Convers v. Phœnix Mut. L. Ins. Co. 6 Chicago Leg. News, 144, U. S. Circuit, Minnesota.

the policy must relate to some circumstance which might render an insurance on his life unusually hazardous, or which might affect unfavorably his prospects of life; while an untruthful or incorrect answer to the specific questions asked, renders the policy absolutely void, though made in relation to a matter not material to the risk.

§ 73. In Mallory v. Travelers' Insurance Co., the insured was a soliciting agent of the company. The policy was, by its terms, to be void "if obtained through misrepresentation, fraud, or concealment." The company claimed that there was a concealment in the application, because he omitted to state the fact that some twenty years previously, during a sickness, he had been insane, and three or four years before the insurance, he had been for about three months in a retreat for the insane—facts which, it was argued, he must have known to be material, because in verbal instructions given to him, as agent, he was notified that the company did not insure persons who had been insane. There was no inquiry upon the subject in the application; but there was a question, which was answered in the negative, as to whether there were any circumstances which rendered him peculiarly liable to accidents. The judge left it to the jury to say whether there was a concealment of any material fact, instructing them that if all the questions put were fully and fairly answered, it was not a fraudulent concealment to omit to state a fact, which, though material to the risk, was not called for by any specific or general question; and also, that if the applicant conformed to the general rules of the company, he was to be held to no greater duties than any other applicant, and that the fact of his being an agent of the company, made no difference; that, if he did not conceal any fact which in his own mind or opinion, knowing the rules of the company, was material, and if he was guilty of no positive falsehood, or concealment of facts which was equivalent to falsehood, the policy was not avoided. On appeal to the General Term, these instructions were sustained, the court saying: "Although the fact that the insured had been in-

sane might, if communicated, have prevented the defendants from accepting this particular risk, yet the evidence does not show that the attention of the assured was called to the subject at the time the application was made, or the risk assumed, and there is no evidence that the assured was at that, or at any other time, aware that this circumstance, or any other, rendered him peculiarly liable to accidents. It was, it is true, ascertained after his death, that his heart was not in a healthy condition, but it does not appear that the deceased had any knowledge of the disease appertaining to that organ. There was, therefore, no concealment, within the meaning of the policy, of either of these facts, whether the policy be construed as meaning an intentional or fraudulent concealment, or otherwise. To make out any concealment, within the meaning of the policy, it must at least appear, with reasonable certainty, that the assured was cognizant of the fact alleged to have been concealed, at the time of the alleged concealment." On appeal, the Court of Appeals say:[1] "The judge was right in charging that if the deceased did not conceal any fact which, in his own mind, was material, in making the application, the policy was not void. Cases cited by counsel were cases where false answers were given to inquiries made, and have no application to this case."

§ 74. **Exceptions.**—But to these rules, respecting the non-communication and misrepresentation of material facts, there are some exceptions, namely, when the facts of which the knowledge was withheld, or without fraud erroneously represented, came before the execution of the policy, to the knowledge of the assured,[2] and also facts which the under-

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[1] 47 N. Y. 52. In Fowler v. Mut. L. Ins. Co. 4 Lans. 202, the question was raised but not decided, whether an answer that the death of the father of the insured was caused by drowning, whereas the death was suicidal, was a fatal concealment.

[2] Lindenau v. Desborough, 3 C. & P. 353. It was objected that a fact alleged to have been concealed, was in fact known to the company, having been communicated to them by a third party by letter. Lord Tenterden says: "If that had expressly disclosed the facts material to be known, it might have been a question whether it was material to tell the office that which they in effect knew before, but, this letter containing no direct infor-

writer ought to know, or takes upon himself the knowledge of, or waives being informed of.[1] The personal appearance and examination of the assured does not, however, remove the obligation, resting on the applicant, to communicate to the insurers all the material facts in his knowledge.[2] It seems to be held that if by an answer, the company is put upon inquiry, the matters directly connected therewith are not concealed. And this is probably true, but in such cases it will ordinarily be found that the result is that some other question is not correctly answered, in which case the policy would for that cause be rendered void, for if an answer is false, it is no excuse that the insured gave the company the means of ascertaining its falsity, if he did not actually point it out. The company has a right to rely upon his warranty of the truth of his answer.[3]

In a recent case in New York, the company alleged that there was both misrepresentation and concealment as to scrofula being the cause of the death of the brother and sister of the insured, and it appeared that the question put was, "Have the parents, brothers or sisters of the party been afflicted with insanity, or with pulmonary, scrofulous, or any constitutional disease?" to which the answer was in the negative. The court say, "If the answer was proved to be untrue, the plaintiff was rightly nonsuited. In considering the question of the truth of this particular

mation, it is all rumor and report." In Pimm v. Lewis, 2 F. & F. 778, a case of fire insurance, it was provided that the policy should be void if the assured should "omit to communicate any matter material to be made known to the insurers," and it was held that this meant some matter not only material, but also unknown to the insurers, and it did not apply to something which it might well be presumed was known to them or their agent." See May on Ins. § 207.

[1] Bunyon, 54. See Sweeney v. Promoter L. Ass. & Ann. Co. 14 Irish Law, N. S. 476.

[2] Swete v. Fairlie, 6 C. & P. 1; Lorillard F. Ins. Co. v. McCullock, 21 Ohio, 176; Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101.

[3] Phillips, § 601. In Westrop v. Bruce, Batty, 155, it was urged that as the agent of the insurer had made independent inquiry as to the matter misrepresented—the age of the insured—and was satisfied with the result, the misstatement was unimportant, but the court say: "this is a case in which the party insuring had warranted the age of the life insured, and therefore the question was not whether the insurer was satisfied with the representation made, or adopted it, but upon the fact of the age as warranted." To same effect, Murphy v. Harris, Batty, 205.

answer, plaintiff's answers to other questions upon the same subject must be borne in mind. For if the answers to other questions informed defendants truly of the matters inquired into, the answer in question cannot be said to be untrue so as to avoid the policy. The question was put to the plaintiff to enable the company to know whether insanity, pulmonary, scrofulous, or other constitutional disease existed in the family of her husband.[1] If the answers conveyed to them the information that scrofula was a disease existing in the family, they had the information they needed to enable them to determine the propriety of taking the risk. Plaintiff, in answer to a subsequent question, told them that her husband's mother died of scrofula. And in answer to another question she told them that her husband's sister died of disease of the blood. It seems to me that when the fact was disclosed that the mother died of scrofula, and one of the daughters of disease of the blood, the existence of scrofula in the family was as clearly stated as if they had been told it was hereditary."

§ 75. **Waiver of Information.**—A waiver of the right to information as to matters inquired about may be inferred from the issuing a policy upon an application in which such questions are left unanswered.[2] But in a Scotch case of life insurance, where the judge at the trial directed the jury to consider whether a question, as to the habits of the insured, remained unanswered, and if so whether this did not imply a waiver or abandonment of the inquiry as to his habits, it was held[3] on appeal that he ought at the same time to have instructed them that such an implied abandonment or waiver did not relieve the insured from making a disclosure of every fact material to be known.

§ 76. **Company Chargeable with Knowledge possessed by its Agent.**—A question of great importance exists as to how far the insurer is chargeable with a knowledge of facts which are

[1] Swift v. Mass. Mut. L. Ins. Co. 2 N. Y. Supreme R.

[2] Liberty Hall Ass. Co. v. Housatonic Mut. F. Ins. Co. 7 Gray, 261; Hall v. People's Mut. F. Ins. Co. 6 Gray, 185.

[3] Forbes v. Edin. L. Ass. Co. 10 Ct. of Sess. Cas. 451.

known to his agent, though really unknown to the principal. The business of life insurance is chiefly conducted by means of agents scattered over the country, who are paid usually by a commission on the premiums received through their efforts, and who, therefore, have the strongest inducement to cause every application to appear in as favorable a light as possible. They usually fill out the answers to the questions contained in the formal application, from the verbal statements of the applicant, and not unfrequently, from carelessness or interest, either do not put down in full the substance of what is stated to them, or soften down the answers which their experience tells them may exert an unfavorable effect upon the acceptance of the application. The applicant frequently signs the application thus filled up without even reading it, or if he reads it and remarks any omission or changes from his verbal statement, he is not unfrequently assured by the agent that it makes no difference, but that it is all the same in substance. Sometimes a doubt arises as to the meaning of the terms used in the questions, such as "spitting blood," or "serious disease," and the agents explain them in a way most favorable to the acceptance of the risk. Where such things occur it is important to know whether, if it turns out that there is a misrepresentation or concealment in the application, the company can avail itself of it.

§ 77. The earliest case of life insurance where it was attempted to charge the company with the knowledge possessed by the agent, was that of Vose v. Eagle Life and Health Insurance Co.,[1] in which the Supreme Court of Massachusetts disposed of the question very summarily. There was an award to the effect that though the applicant stated that he could not say that he was afflicted with disease or disorder, but was troubled with general debility, yet that he knew of symptoms which indicated consumption, and had at the time reasonable cause to believe that he had that disease, but did not in fact so believe. It also found that so many

[1] 6 Cush. 42. See Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101.

of the symptoms of the applicant's disease were known to the agent of the company before the policy was made and delivered as to indicate to a man of ordinary intelligence that he was laboring under disease of a pulmonary character, and that the agent had reasonable cause to believe he was so affected, but the court say:[1] "The knowledge which the award finds that the defendant's agent had in regard to the situation of the insured cannot be material. The agent did not and could not make the contract. He received the application and forwarded it to the directors of the company at their place of business, and the contract and policy were there made and signed by the officers of the company wholly upon the basis of the application, which is expressly declared, both in the application itself and in the policy, to form a part of the policy. Both the application and policy are particularly explicit and strong in this respect."

§ 78. The Supreme Court of Iowa arrived at a different conclusion, holding expressly that knowledge of the untruth or fraudulent character of an answer to a question in an application, communicated to an agent, while taking or making the application, is in law information given to the company, which, therefore, cannot be allowed to say that the policy is void. The application for the policy, which was by a wife on her husband's life, made its statements and the answer of the insured and of the physician and friend referred to the basis of the contract, and it was agreed that if they contained any untrue or fraudulent allegation, the premiums paid should be forfeited; while the policy itself provided that it should be forfeited if the statements were in any respect untrue. The agent of the company sent another agent to the friend and the physician referred to, in order to obtain answers to the ordinary questions, and in the application, when produced on the trial, they appeared as follows: "Are his habits of life temperate? Answer. I think they are. Has he always been temperate? Answer. So far as I know."

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[1] 6 Cush. 42.

On the trial[1] this friend testified, "I looked over the questions I was requested to answer in the application, and when I saw the questions: 'Is he sober and temperate?' and 'Has he always been so?' I said to Mr. Case, Mr. Miller was already insured in the Equitable, and I had advised him not to surrender his policy in that company, as it had been running for a number of years, and if this company was going to take a policy on his life, I wanted them to take him understandingly. So far as I was concerned, to the first question, 'Is he sober and temperate?' I could answer 'yes.' I gave my reasons why I could so answer. I had got Mr. Miller a situation in my brother-in-law's bank, upon the express promise that he would not drink any more; that he had been perfectly sober since he had been in the bank, and I trusted he would be so in the future. That in regard to the next question: 'Has he always been temperate?' I said I had known Mr. Miller for a period of ten years, and during that time he had not always been a man of sober and temperate habits, but had indulged in the use of intoxicating liquors; that if I answered that question at all, I should have to answer it, conscientiously, and say, 'No;' to which he replied that it was a mere matter of form, and requested me to leave it blank. Therefore I filled out the answers in the blanks to the other questions, and signed my name. Thereupon Mr. Case took the application out of my office, and I never saw it afterwards until it was introduced in evidence on the former trial of this cause. I never gave anybody permission to fill the blank.' Case returned to the agent with the interrogatories, and informed him 'that Mr. Miller was not insurable, on account of Mr. Rogers' statement, and that the latter had not filled the blank in answer to the question, 'Has he always been temperate?' The answer, 'so far as I know,' to the interrogatory, 'Has he always been so?' propounded to Rogers, was in the handwriting of the agent, who testified that Rogers gave him permission to so fill it. Dr. Sprague also failed to answer the question,

[1] Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins. Law Jour. 25..

'Has he always been so?' and the evidence tended to prove that the answer thereto was in the handwriting of the agent. There was no evidence that he had any authority from Sprague to so answer it. Among the questions answered by Case, the agent, was the following: 'Do you consider him, from the information you have, a fit person to be insured, and do you recommend him to the directors as such?' Answer. 'Yes.'" The testimony showed that Miller, for many years prior to the insurance, had been a man of very intemperate habits, and tended to prove that his death was caused thereby.

A verdict having been rendered for the plaintiff on a defense setting up false statements in regard to the habits of the insured, and also alleging death from intemperance, an appeal was taken, in deciding which the court say: "This assignment presents for our consideration this interesting question: Is an insurance company, transacting business through an agent having authority to solicit, make out and forward applications for insurance, to deliver over policies when returned, and to collect and transmit premiums, affected by the knowledge acquired by such agent, when engaged in procuring an application, and bound by his acts, done at such time with respect thereto?" The court then examine various cases,[1] and say that the judicial mind is rapidly tending to the view that the company is bound by the knowledge the agent acquired in the principal's business. They add, "These companies select their own agents, require them to enter into bonds for the faithful discharge of their duties, and send them forth, provided with blanks and clothed with all the insignia of authority. If their ignorance or their cupidity leads them to recommend improper risks it is more in consonance with reason that the loss should be borne by the company, than that the

[1] Vose v. Eagle L. & Health Ins. Co. 6 Cush. 42; Smith v. Ins. Co. 24 Penn. 320; Mitchell v. Lycoming Mut. (F.) Ins. Co. 51 Penn. 402; Wilson v. Conway F. Ins. Co. 4 R. I. 141; Lowell v. Middlesex Mut. F. Ins. Co. 8 Cush. 127; Forbes v. Agawam F. Ins. Co. 9 Cush. 470; Lee v. Howard (F.) Ins. Co. 3 Gray, 583; Rowley v. Empire (F.) Ins. Co. 36 N. Y. 550; s. c. 3 Keyes, 557; Masters v. Madison Co. Mut. (F.) Ins. Co. 11 Barb. 624; Sexton v. Montgomery Co. Mut. (F.) Ins. Co. 9 Barb. 191; McEwen v. Montgomery Co. Mut. (F.) Ins. Co. 5 Hill, 101; Anson v. Winnesheik (F.) Ins. Co. 23 Iowa, 84.

assured should be made the victim of the incompetency or the avarice of the agent. More especially is this true, in view of the fact, that the company has the means of indemnity through the bond of the agent. Just principles of public policy require that these companies should be held to a strict degree of responsibility for the acts of their agents. They will thus be led to the exercise of greater circumspection in the selection of agents," and they conclude, "It follows that, in our opinion, the court did not err in instructing the jury that the defendant was bound by notice communicated to its agents."

This decision, it will be seen, is not made to turn upon the fraudulent act of the agent in filling up answers left blank by the physician and friend, but on the fact that the agent was correctly informed of all the facts, and that the company was conclusively presumed to know all that he knew upon the matter.

§ 79. The Supreme Court of the United States has recently arrived at the same conclusion.[1] It was alleged that a false answer was made as to the age of the mother of the insured at the time of her death, and as to the disease of which she died. The application showed that it was answered that she died at forty of a fever. Evidence was given by defendant tending to prove that she died much younger of consumption. In avoidance of this, plaintiff was permitted to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother's death or her age at the time; that the wife was too young to know or remember anything about it, and the husband had never known her; but that there was present at the time the agent was taking the application, an old woman, who said she had knowledge on that subject, and that the agent questioned her for himself, and from what she

[1] Union Mut. L. Ins. Co. v. Wilkinson, 13 Wal. 222; s. c. 1 Ins. Law Jour. 607; s. c. below, 2 Dillon, 570.

told him he filled in the answer which was alleged to be untrue, without its truth being affirmed or assented to by plaintiff or the wife. The jury found this in their special verdict, and also that the moth er died at the age of twenty-three years, and did not die of consumption. The husband and wife had all been slaves, and it was found that the applicant did not know, when the application was signed, how the answer to this question had been filled in. The court instructed the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment based upon data thus obtained, it was no defense to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years. To the introduction of oral testimony regarding the action of the agent, and to the instructions of the court on that subject the defendant excepted, and assigned the ruling of the court as error, on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

In giving their decision, the Supreme Court say: "The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized, that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. This rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common-law action, may be more circumscribed in the freedom with

which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him. In the case before us a paper is offered in evidence against the plaintiff, containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff, in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

"If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith, and of the grossest injustice and dishonesty. And the reason for this is that

the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by defendant, who procured plaintiff's signature thereto. It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or as it is sometimes called, estoppels in pais. The principle is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity, where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well considered judgments by the courts of this country.[1] Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal. * * "It is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, Whose agent was Ball in filling up the application? * * It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the per-

[1] They cite Plumb v. Cattaraugus Ins. Co. 18 N. Y. 392; Rowley v. Empire Ins. Co. 36 N. Y. 550; Woodbury Saving Bank v. Charter Oak Ins. Co. 31 Conn. 526; Combs v. Hannibal F. & M. Ins. Co. 43 Mo. 148.

son so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party, who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent, who has persuaded him to effect insurance, as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward application on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions

in this country is steadily in the opposite direction. * * * * In the fifth edition of American Leading Cases,[1] after a full consideration of the authorities, it is said that, 'by the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.' The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents—not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it."

§ 80. **Company Estopped from Defending.**—There is a series of comparatively recent cases upon fire insurance, in which the doctrine of estoppel has been applied against the insurer.[2] These cases, with others, will be fully examined in discussing the question of agency. It is sufficient here to call attention to the point which they decide. As stated by Fullerton, J.,[3] the case first cited "goes the whole length of

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[1] Vol. 2, p. 917.

[2] Plumb v. Cattaraugus Co. Mut. (F.) Ins. Co. 18 N. Y. 392; Rowley v. Empire (F.) Ins. Co. 36 N. Y. 550; Geib v. Internat. F. Ins. Co. 1 Dillon, 443; Comm. F. Ins. Co. v. Ives, 56 Ill. 403; North Am. Ins. Co. v. Thorp, 22 Mich. 146; Comm. (F.) Ins. Co. v. Spankneble, 52 Ill. 53; McBride v. Republic F. Ins. Co. 30 Wisc. 562.

[3] Rowley v. Empire (F.) Ins. Co. 36 N. Y. 550; s. c. 3 Keyes, 557. See as to this case, Le Roy v. Market F. Ins. Co. 45 N. Y. 80.

establishing the doctrine, that although an application for insurance contains a false statement as to a material matter, the writing must still be held to express the contract between the parties, and that neither party can insist that the contract is other than what the writing expresses, provided such false statement is chargeable to the agent of the company in making the survey and filling up the application, while acting within the line of his duty." And in the case last cited, the same judge says: "I repeat, that in performing these preliminary labors, the agent is engaged in 'taking the application,' which is strictly within his duty, and the principal should be held responsible for any error he may commit, especially when the error consists in recording a false statement over the signature of a confiding applicant, which it is claimed vitiates the whole contract."

It has also been held that a misrepresentation, made where the agent of the company who received the application knows the true condition of things, does not avoid the policy, on the principle that the knowledge of the agent is the knowledge of the principal.[1] So where something was unintentionally omitted from the application, and the agent on being informed of it said it would make no difference.[2] So also if the company depends upon its own knowledge of the facts.[3]

§ 81. These cases, and other similar ones, establish as the rule that if the applicant correctly states the facts, but

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[1] Foot v. Ætna L. Ins. Co. 4 Daly, 285; Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415; Roth v. City (F.) Ins. Co. 6 McLean, 324; Campbell v. M. & F. F. Ins. Co. 37 N. H. 35; Clark v. Union Mut. F. Ins. Co. 40 N. H. 333; Howard F. Ins. Co. v. Bruner, 23 Penn. 50; Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202; Atlantic (F.) Ins. Co. v. Wright, 22 Ill. 462; N. E. F. & M. Ins. Co. v. Schettler, 38 Ill. 166; Meadowcraft v. Standard F. Ins. Co. 61 Penn. 91; Hartford Prot. (F.) Ins. Co. v. Harmer, 2 Ohio State, 452; Ætna Live Stock F. & L. Ins. Co. v. Olmstead, 21 Mich. 246; Comm. F. Ins. Co. v. Spankneble, 52 Ill. 53; Keith v. Globe (L.) Ins. Co. 52 Ill. 518; *Contra:* Lowell v. Middlesex Mut. F. Ins. Co. 8 Cush. 127; Lee v. Howard (F.) Ins. Co. 3 Gray, 583; Smith v. (F.) Ins. Co. 24 Penn. 320. In the latter case the assured knew of the false statement. See also Wilson v. Conway F. Ins. Co. 4 R. I. 141.

[2] F. & M. Ins. Co. v. Chesnut, 50 Ill. 111.

[3] Cumb. Val. Mut. Prot. Co. v. Schell, 29 Penn. 31; Comm. F. Ins. Co. v. Ives, 56 Ill. 403.

the agent records them wrongly in an application subsequently signed by the insured, the company cannot avail itself, in defense of an action on the policy, of any alleged misrepresentation or concealment in the application as to the facts so made known to the agent; in other words, the company cannot show for the purpose of avoiding the policy, that in these respects the facts were different from what the application states.[1] And it makes no difference in such case that the application expressly provides that the agent is the agent of the applicant and not of the company.[2]

§ 82. **The Rule upon Principle.**—Irrespective of these decisions it would have seemed that, upon principle, the sound rule would be that the insured should be bound by his written application, that if he signs it, no matter who fills it up, he shall be bound by all the statements it contains, unless some device is resorted to so as to prevent his knowing its contents, and if it omits anything which he may have stated to the agent, he should be chargeable with that omission, for he understands that the written application contains the only information that the company will really receive.[3] Of course if by any device or assurances the agent prevents him from reading his application before he signs it, the company may fairly be held liable. An error or misrepresentation, committed by the agent in explaining the terms used in the application, may properly be held chargeable to the company, for being the agent to procure the completed application, he is acting within the scope of his powers in explaining the meaning of the terms used by the company in its questions.[4] In any case, therefore, where the language

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[1] Woodbury Savings Bank & Build. Ass. v. Charter Oak F. & M. Ins. Co. 31 Conn. 517; Bebee v. Hartford Co. Mut. F. Ins. Co. 25 Conn. 51; Malleable Iron Works v. Phœnix (F.) Ins. Co. 25 Conn. 465; Combs v. Hannibal Savings & (F.) Ins. Co. 43 Mo. 148; Franklin v. Atlantic F. Ins. Co. 42 Mo. 456.

[2] Comm. F. Ins. Co. v. Ives, 56 Ill. 403; and see Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222; s. c. 1 Ins. Law Jour. 607.

[3] Geib v. Internat. F. Ins. Co. 1 Dillon, 443.

[4] Malleable Iron Works v. Phœnix (F.) Ins. Co. 25 Conn. 465; Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415.

is reasonably capable of more than one meaning, the company should be estopped from denying that they used it in the sense stated by the agent.[1] The case of an omission of some statement, made by the medical attendant or a friend referred to, presents another phase of the same matter, in relation to which still other considerations may perhaps be presented. Some companies so frame their applications that the applicant is made to state, not only that he knows its contents, but that the company is not to be held chargeable with any knowledge not contained in it, or conveyed to it in writing by or on behalf of the applicant. Where this is done, the questions we have been considering cannot arise.[2]

If the agent of the assured commits a fraud in procuring the policy, the assured is chargeable with such knowledge; he cannot retain the benefit of the fraud, and be relieved from the consequences of the fraudulent means by which it was obtained, and if in such case the agent of the company is a party to the fraud, the company is not chargeable with the knowledge possessed by him nor responsible for his acts. The rule which charges the principal with what the agent knows is for the protection of an innocent third person, and not for those who use the agent to further their own frauds upon the principal.[3]

§ 83. **Where Application is Fraudulently Changed by Agents.** —Another class of cases has arisen in practice, though none has been the subject of any reported judicial decision,[4] in which the agent is guilty of actual fraud, by changing the application after it is signed. In such cases there should be little difficulty in holding the company bound. One or the

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[1] Woodbury Savings Bank & Build. Ass. v. Charter Oak F. & M. Ins. Co. 31 Conn. 517; Malleable Iron Works v. Phœnix (F.) Ins. Co. 25 Conn. 456; Combs v. Hannibal Sav. & (F.) Ins. Co. 43 Mo. 148.

[2] Chase v. Hamilton (F.) Ins. Co. 20 N. Y. 52; Loehner v. Home Mut. F. Ins. Co. 17 Mo. 247.

[3] Nat. L. Ins. Co. v. Minck, N. Y. Court of Appeals, 2 Ins. Law Jour. 820; reversing s. c. 6 Lans. 100; Smith v. Ins. Co. 24 Penn. 320.

[4] As already stated, *ante*, § 78, though Miller v. Mut. Ben. L. Ins. Co. presented this point, the decision was not based upon it.

other party is to be a loser, and the party whose agent commits the fraud should, both in law and in equity, be that party. In its practical results this would almost necessarily be the case. The insured sues upon the policy, and the company defends on the ground of misrepresentation in the application. On the trial it produces the paper received by it from its agent, but the assured objects that it is not his application, and that he is not bound by its statements. The only answer that the company can make, is that it is the application upon which it issued the policy, but that is no legal answer, for the reason that there was no necessity for any formal application. The company might have issued the policy without any application at all,[1] and though it may be bound by the application it had before it, it does not follow that the assured is to be considered bound by a paper of whose existence he had no knowledge. It can hardly be said, that by accepting the policy under the belief that it was issued by the company after receiving the application actually signed by him, he is bound by the other paper which really reached the company.[2] The only other ground on which the company could claim to be relieved from liability would be on some objection based on the ground that there was no actual contract, the minds of the parties not having met. But that doctrine can hardly be applied to such a case. The minds of the parties have in fact met on the contract. The company has issued the policy, and the insured has accepted it. At most, the minds have not met upon one of the inducements to the contract, unless indeed the doctrine that the application is a part of the contract can be successfully invoked.

§ 84. **Misrepresentation or Concealment by Referee.**—The effect of a misrepresentation or concealment by a person other than the person by whom, or for whose benefit, the insurance is obtained, has been a frequent subject of discus-

[1] Blake v. Exchange Mut. F. Ins. Co. 12 Gray, 265; Newman v. Springfield F. & M. Ins. Co. 2 Ins. Law Jour. 682; Clinton v. Hope (F.) Ins. Co. 1 Ins. Law Jour. 436.

[2] But see Draper v. Charter Oak F. Ins. Co. 2 Allen, 569.

sion. It is presented where a person seeking insurance on his own life refers the company to a physician or friend, and one or both of them is guilty of a misrepresentation or concealment. It is also presented where a person seeking to procure insurance on the life of a third person refers the company to that person, and he in like manner is guilty of misrepresentation or concealment. A series of early English cases have usually been cited as deciding that the person thus referred to became thereby the agent of the applicant, in such sense that any false statement made by him had the same effect in vitiating the contract as if made by the applicant. But in a recent case[1] these decisions have been reëxamined, and an attempt made to show that they do not involve such a conclusion.

§ 85. The earliest of these cases is Maynard v. Rhode.[2] The form of policy does not appear in the report of the case. It was an insurance upon the life of a third person by an annuity creditor, and the third person misrepresented a material fact by not stating correctly the name of the last attending physician, and by saying he had had no serious illness. It does not appear that the question of agency was argued by the counsel, the fact being apparently assumed. Lord Campbell[3] says, "it was regarded as a conditional policy, and therefore the untrue representation by the 'life' of a fact of which the assured was not cognizant was taken to have been incorporated in the policy;" but this hardly disposes of the case, for Abbott, C. J., expressly stated in his charge to the jury, that, "though the party here was an annuity creditor of Col. Lyon, yet, if he allowed the Colonel to make these representations when the policy was effected, he is bound by them; and, however hard it may be on the plaintiff, the rules of law must be adhered to." And in the report in Dowling and Ryland, it appears that in the charge to the jury they were directly told that the plaintiff was bound by Col.

[1] Wheelton v. Hardisty, 8 E. & B. 232; s. c. 3 Jur. N. S. 1169; 5 Ib. 14; 26 L. J. Q. B. 265; 27 Ib. 241.

[2] 1 C. & P. 360; s. c. 5 D. & R. 266.

[3] Wheelton v. Hardisty, *ubi supra*.

Lyon's misrepresentation, though he himself was not privy to the falsehood; and this charge was approved on appeal. It appears, though it is not stated in the report of the case, that Lyon was sent, by the assured to the office of the company, at the time he gave the false statement; and the declaration alleged as part of the consideration of the contract that the statement made by Lyon was true.[1]

§ 86. In Lindenau v. Desborough[2] the insurance was upon the life of a third person, but the question of agency does not seem to have been raised, and Lord Campbell points out[3] that the misrepresentation, which was as to the health and habits of the insured, was of a fact within the knowledge of the assured. The declaration contained an averment of compliance with all the terms of the contract.[4] Lord Campbell also says, correctly,[5] that in Swete v. Fairlie,[6] the question was upon the materiality of the representation or concealment, but he omits to say that Denman, C. J., remarks: "I confess that I entertained at first considerable doubts whether a third person, not having any interest in the immediate cause, could by any misrepresentation injure the party making the insurance. I will not give any opinion on that point here; it may very fitly be considered elsewhere." Another case usually referred to, upon this question, is that of Morrison v. Muspratt,[7] but the report does not show the form of the policy, and the point does not seem to have been discussed. It can, therefore, as said by Lord Campbell,[8] "have little weight as to the question we have now to determine." Huckman v. Fernie[9] presented the question more distinctly, though there was a question of pleading involved. It was a case where a husband obtained insurance upon his wife's life. She, on examination by the company, answered the questions put to her, but concealed

[1] See Everett v. Desborough, 5 Bing. 503, 512. See, as to this case, 5 Irish Law, 159.

[2] 8 B. & C. 586; s. c. 3 C. & P. 353; 3 M. & R. 45.

[3] Wheelton v. Hardisty, *ubi supra*.

[4] Hayes, 391.

[5] Wheelton v. Hardisty, *ubi supra*.

[6] 6 C. & P. 1.

[7] 4 Bing. 60.

[8] Wheelton v. Hardisty, *ubi supra*.

[9] 3 M. & W. 505; s. c. 2 Jur. 444.

material matters which were not, in point of fact, known to her husband. In the course of the argument Lord Abinger says: "She was not sent to effect the policy; she was merely sent for the purpose of answering the questions put to her at the office. If she had been sent to effect the policy, she would then be the agent of the husband for that purpose, and any concealment by her would have been concealment by him, and would have vitiated the policy." And in deciding the case, he repeats the same views, saying: "It was contended by Mr. Crowder, on behalf of the defendant, that the wife of the plaintiff was for that purpose the agent of the husband, and that the knowledge of the wife ought to be considered the knowledge of the husband; the jury found that the husband did not know the facts which were supposed to be material. Now, of course, if the wife had been the general agent going to effect this policy for her husband, it would be like any other agent going to effect a policy for his principal, whose knowledge might be considered the knowledge of his principal for the purpose of effecting the policy. But in this case the wife was not the agent of the husband for the purpose of effecting the policy; she was no otherwise his agent than to answer particular questions, such as the company might choose to ask of her; and she was only to answer questions which they were to put; and if they had put to her any questions of a kind calculated to elicit a particular fact said to be concealed, it might be questioned then whether or no she was not his agent for that purpose. But no such question was put; it was said she knew of certain illnesses she had had before, and concealed that fact; however, she gave general answers to printed questions; and we think the meaning of the plea, therefore, is, what the jury have found it to be, that the husband himself had no knowledge, and it cannot be considered to be an allegation that the plaintiff through his agent had knowledge. The effect of the plea is, that the husband had personal knowledge; the jury have found that he had no knowledge." Lord Campbell [1] disposes of this

[1] Wheelton v. Hardisty, *ubi supra.*

case by saying, that, nothing is laid down in it to strengthen the doctrine that where the policy is in the form it was in Wheelton v. Hardisty, "the assured acting with good faith can be prejudiced by what is said or concealed by the 'life' or the referees."

§ 87. Lord Campbell is compelled to admit that the marginal note in Everett v. Desborough,[1] "certainly does lay down in the most general and unqualified terms, that in an insurance upon the life of another, the life insured, if applied to for information, is, in giving such information, impliedly the agent of the party insuring, who is bound by his statements and must suffer, if they are false, although he is unacquainted with the life insured." But he seeks to limit the force of this by saying, that the policy was an Atlas policy, containing a clause, "whereby the assured expressly takes upon himself to guarantee the truth of what the 'life,' or the referees have said," and that the language of the judges must be taken in reference to that clause or condition, "and, if they could be supposed to have overlooked it, the authority of their decision cannot be considered very high." The fact as to the form of the policy is as stated by Lord Campbell; but none of the judges, except Burroughs, J., in their opinions place their decision in any degree upon any peculiarity of form. Best, C. J., says: "I think we may decide this point on the general rule of law, that the principal is responsible for any representations made by his agent relating to the business in hand. For has not the plaintiff, the assured, made Mr. House his agent for the purpose of this insurance? When Mr. Lye applies to the plaintiff, the plaintiff says: 'I can give no account; you must go and inquire who was Mr. House's medical attendant.' And who could give him the best account? To whom should he go? Who could give him direct and satisfactory information on the subject but Mr. House? Then the assured must have known of the statement signed by Lye, because Lye swears that he showed him the paper,

[1] 5 Bing. 503. The policy made the conditions on the back the basis of the contract, and one of these was for a reference to the usual medical attendant. Hayes, 391.

and that the other said: 'I dare say it is all correct.' He either did know it, or might have known it, which as far as regards his responsibility, is the same thing as if he did know it. * * By suffering that paper to be handed in, he adopts that reference, and makes Mr. House his agent, for the purpose of making the reference." Park, J., says: "Was it not then, of course, that the plaintiff who made the reference to this very man, because he was the person who could give the best information, should be bound by the representations House made concerning himself?" Gaselee, J., says: "It has been said he was not the agent of the plaintiff. The plaintiff said to Lye, 'Do you make the necessary inquiries, and I will sign the paper.' Now it appears to me, that when that is coupled with what passed afterwards, viz., Lye's coming and beginning to read over the declaration, and to state what was in it, when the plaintiff cut him short, and said he took it for granted it was right, that it does constitute House the agent of the plaintiff, and that he is bound by the misrepresentation of such agent."

§ 88. The only other case is Rawlins v. Desborough,[1] where it was stated in the charge to the jury that the doctrine, "that the party whose life was insured was the general agent of the assured, and that the latter was responsible for all the acts of such party connected with the insurance, had been greatly overstrained. He is to answer all questions put to him, and if he answers them falsely that will vitiate the policy. Or even if, without being distinctly interrogated as to his habits, the jury thought that he was aware of them, and knowing their importance, studiously concealed them from the insurers," they were to find a verdict for the defendant. "But the mere non-communication of his habits of life, by the party whose life was insured, would not in itself vitiate the insurance, even though those habits were in the opinion of the jury such as tended to shorten life." Lord Campbell says of this case, that being an Atlas Company policy, he presumes it contained the usual condition inserted

[1] 2 Mood. & Rob. 328.

by that company, that, if the declaration is not in all respects true, the policy will be forfeited, and that it turned mainly upon these matters. The reporters, in a note which Lord Campbell describes as "able," elaborately examine the decisions made prior to that time. In the course of the note they say: "It might as well be contended that when a servant, applying to be hired, is asked for the name of his former employer and gives it truly, such former employer is to be considered the agent of the servant. It seems a more natural and just conclusion to hold that in both instances the referee is a middleman, the agent of neither party, but himself liable to the consequences of any falsehood of which he may be guilty. * * The more reasonable rule to be laid down would appear to be this—that the party whose life is insured is to be considered the agent of the assured, for the purpose of answering all such questions as are put to him, and of communicating to the insurers such facts within his knowledge as he at the time believes to be material. * * On the whole therefore it is apprehended, that there is no decision of the courts inconsistent with the opinion * * that the party whose life is insured is only the agent of the assured, for the purpose of answering such questions as shall be put to him by the insurers, and that his non-communication of a material fact as to which they do not question him, will only vitiate the policy if he knew of that fact, and believed it to be material."

§ 89. In the recent case of Wheelton v. Hardisty,[1] after a review of the prior decisions, the doctrine hitherto supposed to be laid down in them is in a great measure modified. In that case, insurance was procured upon the life of a third person, and it was stated in the policy that "the said association had thereupon undertaken the proposed assurance, subject to the terms and conditions therein and thereunder expressed;" the proposal referred to the answers of his ordinary medical attendant and a friend, rendered to another

[1] 8 E. & B. 232; s. c. 3 Jur. N. S. 1169; 5 Ib. 14; 26 L. J. Q. B. 265; 27 Ib. 241.

company, and added, "we believe the above particulars and statements are true," but the jury found that the statements were untrue, and that there was fraud on the part of the medical attendant and friend, but none on the part of the plaintiffs. The defendants had also communicated directly with the person whose life was insured. The Exchequer Chamber held, in agreement with the Queen's Bench, that the doctor and friend were not the agents of the assured so as to make their fraud, misrepresentation or concealment, that of the assured. Bramwell, B. says, "Fraud on the part of the person effecting the assurance, or of his agent, of course avoids the policy, but I cannot see how the mere fraud of some third party can have that effect, unless there be an express condition between the contracting parties to that effect;" and Campbell, C. J., says: "It has been very powerfully argued before us, that the person whose life is to be insured (as he is usually called the 'life'), and the referees are always to be considered, if not the agents of the assured to effect the policy, at least the agents of the assured in giving answers to all material questions which may be put to them respecting the matters to which they may properly be interrogated. Although this doctrine has some sanction from language which has been used by the judges, it seems to me to be contrary to principle, and the decisions cited in support of it admit of an explanation which leaves me at liberty to condemn it. A policy may no doubt be framed, which shall make the assured liable for any material misrepresentation or concealment by the 'life' or the referees; but what we have to consider is, whether, where the policy contains no express condition for this purpose, and is made on a declaration by the assured that they believe the statements of the 'life' and the referees to be true, the 'life' and the referees are still the agents of the assured in the manner contended for. In the first place, it seems rather strange, if they are employed, not in any respect to negotiate or to effect the insurance, but only to give information as to facts exclusively known to themselves, they should be denominated *agents*.

It often happens that the assured have never seen the 'life,' and are wholly unacquainted with the state of his health and with his habits. But an agent is supposed to do what could be done by the principal, were the principal present. A more serious objection arises from the consideration that this doctrine would entirely prevent a life policy from being a security on which a man could safely rely as a provision for his family, however honestly and however prudently he may have acted when the policy was effected. But, the assurer and assured being equally ignorant of material facts to influence their contract, if the assurer asks for information, and the assured does his best to put the assurer in a situation to obtain the information, and to form his own opinion as to whether the information is sincere, can it be permitted, where the assurer, without any blame being imputable to the assured, has allowed himself to be deceived, that he shall be able to say to the assured, 'you warranted all the information I received to be true; and having received your premiums for many years, now the life drops, I tell you I was incautious, and the policy I gave you is a nullity.' The *uberrima fides* is to be observed with respect to life insurances as well as marine insurances. The assured is always bound, not only to make a true answer to the questions put to him, but spontaneously to disclose any fact exclusively within his knowledge, which it is material for the assurer to know; and any fraud by an agent employed to effect the insurance is the fraud of the principal; but there is no analogy between the statements of the 'life' or the referees, in the negotiation of a life insurance, and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy."

Erle, J., says: "We quite agree with the rule, that the fraud of *the agent who makes the contract* is the fraud of the principal; but we cannot regard the fraudulent parties in the present case as the parties intrusted to make the contract, or to represent the plaintiffs in so doing. It is not necessary to say to what extent such parties may be treated, in some

cases, as the agent of the party insuring; in cases where the representations of the referees are made the basis of the policy, the answers of the referees are binding on the assured, so as to make the falsehood of their representations an answer to an action on the policy; but here, considering that the parties insuring were only required to state their belief as to the matters now under discussion, and that the life and referees were acting really in fraud both of the plaintiffs and defendants, and that they were not at all in the capacity of persons negotiating the contract, we can see no pretence to make them the agents of the parties insuring, so as to make their fraud that of the plaintiffs."

§ 90. With reference to the last case it is to be observed that much of what was said, was not in fact necessary to the decision of the point there involved, for the language of the application only expressed a belief that the untrue statements were correct, and there was no dispute that such was in good faith, the belief of the applicant. It seems, as the result of this examination of the English cases, that the courts have, at various times, been led to lay down or assume as law, that the referee was the agent of the applicant in broader terms than they are now disposed to admit, and that they have greatly qualified their former views upon this subject, though they have not in terms overruled the earlier cases.

In Ireland it is held [1] that the answers of persons to whom an insurance company may be referred for information, are binding only so far as it was agreed, that they should be questioned; while in Scotland it was held [2] that the person whose life is insured, is the agent of the assured, who is bound to know what the insured knew.

§ 91. In considering the question, Bunyon says: [3] "The position that the referees, and particularly the person whose life is proposed for insurance, are the agents *pro tanto* of the

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[1] Rose v. Star Ins. Co. 2 Irish Jurist. O. S. 206.

[2] Forbes v. Edinburgh L. Ass. Co. 10 Ct. of Sess. Cas. 451; s. c. 7 Fac. Col. 351.

[3] P. 36.

proposer, is not without some foundation of natural justice, since the latter especially is usually interested in obtaining the policy, and all, in practice, give the most favorable answers which they conscientiously can to facilitate its issue. They therefore do in a certain sense act, and consider themselves to act, on behalf of the proposer. On the other hand, it is urged that all that the latter can do is to refer to those persons best qualified to give information, and that it is the business of the insurance office to test the evidence offered, and that it is unjust to hold the pr oposer accountable, either for negligence on the part of the office, or frauds on the part of the referees, of which he was wholly innocent. While the earlier cases already referred to, upheld the former view, the contrary has now been decided in a recent leading case, and that with such unanimity on the part of the judges, both in the Exchequer Chamber and in the court below, as to have definitely overruled the former authorities."

§ 92. In this country the question does not seem to have been raised in any case of life insurance except in New York, though it has been assumed elsewhere that the applicant is bound by the answers of the referee, who is treated as his agent. In Rawls v. The American Mutual Life Insurance Co.,[1] one Marsh had been referred to by the applicant as an acquaintance to whom the company could apply for information, and the question was presented as to the effect of Marsh's statement. The court say, though this question of agency does not appear to have been expressly discussed: "the exception to that part of the charge in which the jury were instructed that the statement of Marsh was not a warranty, was not well taken. This statement was not so referred to in the policy as to become a part of it, or be made a warranty. The policy, in terms, states that it was issued upon the faith of certain statements and representations, dated July 15th, 1853, and on file, respecting the life, health, and medical history of Fish. These were the statements of Fish and

[1] 27 N. Y. 282.

Dr. Shipman. Marsh's statement was made on the 16th of July, 1853, and there was no reference to it in the application of Fish, nor did either Fish or the plaintiff procure it to be made, or know anything of the contents of the paper. It seems that it was a rule of the company to require of the person applying for insurance a reference to some third person from whom information might be obtained respecting his general health and habits of life. In this case Fish referred to Marsh, and Holmes, the agent of the company, procured the statement of the latter, and forwarded it, with the other papers, to the office in Connecticut. The statement was not made as a part of the application of Fish, or the plaintiff, nor was such application based upon it. It not being furnished by the plaintiff or Fish, nor the application based upon it, it was not their statement, and hence not their warranty. A statement which the plaintiff did not furnish or rely upon, and of the nature of which he had no knowledge, cannot be converted by the defendants into a warranty to defeat the policy, although they may have been to some extent influenced by such statement in issuing it. The court went quite far enough in instructing the jury, in substance, that as Marsh had been referred to as an acquaintance of Fish, the plaintiff would be responsible for the truth and honesty of his statements, and if in point of fact they were untrue, whether such untruth originated in fraud or mere negligence or want of recollection, it would avoid the policy." In Smith v. Ætna Life Insurance Co.,[1] the court say: "The defendants very properly relied upon the answers and statements contained in the application. There were not required to call for more full and explicit answers. They had the right to regard the certificate of the physician as the statement of the applicant, so far as it related to the question which the applicant referred to him, and they had also a right to assume that the applicant had acquainted the physician with all the facts material to that inquiry before the certificate was made."

[1] 5 Lans. 545. Affirmed, 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116. See, also, Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins. Law Jour. 25.

§ 93. In a case where an insurance company brought its action to recover back money which it paid on a policy, and where the court applied to the case rules different from those which they would have applied, if the action had been by the insured against the company, it appeared, as the court say,[1] that "Previous to the delivery of the policy * * to the defendant Wager, Frisbie, whose life was insured for Wager, made and signed a declaration that he had not been afflicted with (among other things) 'spitting of blood,' and was not then afflicted with any disorder which tends to the shortening of life. The defendant also signed a declaration that Frisbie had not been afflicted with 'spitting of blood,' and that he was not then afflicted with any disorder which tends to the shortening of life, to his knowledge. The policy itself referred to this declaration made by Wager, and provided that if the same should be found in any respect untrue, then the policy should be null and void. * * It does not appear that * * the declaration made and signed by Frisbie, was, by any stipulation or provision of the policy, incorporated in it, and made a warranty. Without reference to the declaration made by Wager, made a part of the policy by the proviso, in an action on the policy by Wager to recover the sum insured, Frisbie, in making his representations as to health, &c.,would have been deemed the agent of Wager; and the question would have been whether he (Frisbie) had misrepresented, or had omitted to communicate any material fact within his knowledge as to his health. The question would not have been a question of fraud; but only, 1st, whether there had been any misrepresentation or concealment; and, 2d, whether the fact misrepresented or concealed was material.* * Of course, if a misrepresentation of a material fact by Frisbie had been fraudulently made, the policy would then also have been void—not because Frisbie would have been deemed the agent of Wager in committing the fraud, but because he was his agent in making the false affirmation as to a fact material to the risk, without reference to Frisbie's

[1] Mut. L. Ins. Co. v. Wager, 27 Barb. 354, 363.

fraud. Fraud implies knowledge; and Frisbie could not be deemed the agent of Wager in committing the fraud, without proof of knowledge or preconcert on the part of Wager. One may be civilly legally responsible for the fraudulent pretences or acts of his agent, without being morally guilty of his fraud. * * When, therefore, Judge Mitchell charged the jury that 'in a suit by the defendant against the company (on the policy) Frisbie might be considered the agent of the defendant, so that whatever Frisbie knew, of himself, would be deemed as known by defendant,' he was strictly correct; unless the insertion of the words, 'to my knowledge,' in the defendant's declaration, made this case an exception; and then such hypothetical portion of his charge represented the rights of the company more favorably than these qualifying words permitted."

§ 94. It would seem upon principle that if an applicant for insurance refers the company to some third person, under such circumstances as to show that he intends the company to obtain from such person certain information, he makes that person his agent, so far as relates to such information, and is bound by his answers. Thus, if the question is, "Name some acquaintance to whom we can apply for information with reference to yourself," it would seem that by naming such a person he makes him his agent in giving such information. But a mere stating, in reply to a question, that a person named is his medical attendant, does not in any way make the latter his agent. There should be something in the nature of an express or implied authority to apply to the person named, and that authority is not to be found in the mere giving of a name in reply to a question, unless that question is so framed as to indicate an intention to apply to the third person.

§ 95. **As to Concealment, Policy speaks from Date of Issue.**—The obligation of the applicant to make a full disclosure, continues down to the time of the completion of the contract, and therefore, if after the representation is actually made a mate-

rial change occurs before the contract is consummated, it is the duty of the parties to inform the company.[1] In such case the party cannot be said to have made any false representation if his statement was true when he made it, but he is chargeable with a fatal concealment, if he allows the policy to be issued without reporting the change. Thus in Traill v. Baring,[2] the company applied to another to reinsure a part of the risk on a life which the first company had taken, stating that they intended to retain the balance, a statement which was then correct. But before the second company had concluded its agreement, the first company had changed its mind, and reinsured the remainder of the risk elsewhere, and it was held that the second company was not liable on its contract. It was shown to be the custom and understanding that the original company retained a portion of the risk, and that the reinsuring company, relying upon this, dispenses with the usual medical examination. The court lay down the law broadly, that if a person makes a representation which is calculated to induce another to assume a particular liability, and the circumstances are afterwards, before the liability is assumed, so altered to the knowledge of the person making the representation, that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation, to communicate to the person to whom he made it, the alteration of these circumstances, and a court of equity will not hold the person to whom he made the representations to be bound by any contract entered into on the faith thereof, unless such a communication has been made.

In another case[3] it appeared that in July, a negotiation was opened for an insurance upon life in the plaintiff's company, and a declaration was signed as to health, with a

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[1] Schwarz v. Germania L. Ins. Co. 18 Minn. 448; s. c. 2 Ins. Law Jour. 449.

[2] 4 Giff. 485; s. c. 33 L. J. Ch. 521; 10 Jur. N. S. 87; 12 W. R. 334; 9 L. T. N. S. 908; and on appeal, 10 Jur. N. S. 377; 12 W. R. 678; 10 L. T. N. S. 215. The acceptance by the second company was: "This office will join you in the risk, &c."

[3] British Eq. Ins. Co. v. Great West. R. R. Co. 38 L. J. Ch. 132; s. c. 17 W. R. 43; 19 L. T. N. S. 476.

reference to the usual medical attendant of the insured, who certified that he was in good health. The insured was also required to state who was "his latest, if other than his usual, medical attendant." He was examined by the company's physicians and accepted as a first class life, but at an advanced premium, on account of his excessive corpulence; but in the letter accepting the proposal, and in the receipt given for the first premium, it was provided that if any change had taken place in the health of the assured, since the date of the medical examination, it should render the policy void. In August, pending the completion of the contract, he consulted another physician, who discovered that he was in a dangerous state of health and suffering from disease of the kidneys, and who warned him that care and abstinence from stimulants were necessary. The insured did not communicate this to the company, but paid the premium, and took the policy in September, and died eight months afterwards of the disease of the kidneys. It was held that the requirement to disclose his latest medical attendant, was a continuing one up to the date of the completion of the contract, and that the non-communication of his visit to the physician, in the interval between the signing of the application, and taking the policy, avoided the policy. Malins, V. C., after stating that if the policy had been taken on or before the time he consulted the other physician, he would have held the policy good, as the inquiries were fairly answered, says: "I have no doubt upon this point of the case, that the declaration signed by Bird requiring him to state 'his latest, if other than his usual, medical attendant,' though made on the 19th of June, must be treated as a continuing declaration, up to the time of his payment of the premium, and therefore, in my opinion, he was bound to mention the circumstance of his having since been to consult Dr. White. Whether or not he communicated the result of the interview, may be immaterial, so long as he gave the office the opportunity of making such further inquiry as they might think fit. * * * Here the man whose

life was to be insured, is told that he is dangerously ill, and that without abstinence from stimulating liquors he will not recover. Clearly he was bound to tell the office that he had consulted another medical man, though I do not say that he was bound to inform them, what the opinion of that medical man was. Such a communication would probably have influenced the conduct of the plaintiffs most materially, because if upon inquiry they had ascertained from Dr White the state of Bird's health, it is not likely that they would ever have granted the policy." On appeal,[1] Selwyn, L. J., seems to rely upon some facts not relied upon by the Vice Chancellor. The question, he says, "therefore here is simply brought to this, whether there was any such alteration in the state of John Bird's health, or even in his belief as to the state of his health, between the time when he gave the answers and the time when the premium was paid and the policy issued, as ought to have been communicated to the company. * * * * There can be no doubt that the statement of John Bird, * * that he was well and had always been well, and that he could not recollect that he had had any illness, was no longer true at the time when the premium was paid. And they are in my opinion facts of such gravity and importance, that they ought to have been communicated to the company." The Lord Justice then examined an alleged excuse, presented on behalf of the insured, for not communicating these facts to the office, that his first physician told him he thought the second one was wrong, and comes to the conclusion that even if this were so, the facts showed that he did not wholly disregard the advice of Dr. White, and that the fact still remained, that his statement that he could not remember when he was last ill, and that he was now and ordinarily enjoying good health, was no longer true when he paid the premium.[2]

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[1] 38 L. J. Ch. 314; s. c. 17 W. R. 561; 20 L. T. N. S. 422.

[2] See, also, as to the necessity of disclosing changes, occurring after the original application, Morrison v. Muspratt, 4 Bing. 60; Calvert v. Hamilton Mut. (F.) Ins. Co. 1 Allen, 308. As to marine insurance, see the recent English cases of Cory v. Patton, 7 L.

§ 96. In a Scotch case[1] in which the issue for the jury was, whether pending the negotiations, a change, amounting to a material alteration of the risk and of the circumstances of the proposal, had taken place in the health and condition of the party proposed, it was held that it would be a change material to the risk if the disease of the party became aggravated in its character from what it was at the time of the proposal, and that it was not necessary to constitute such a change that the disease should alter from one kind to an entirely different one. The case was one of the proposed insurance of a person avowedly afflicted with epilepsy, and whose attacks of the disease increased in frequency and severity before the policy was issued.

§ 97. If, however, the representation is true when made, a change after the policy is issued can make no difference unless the policy so provides. Thus where the representation is that the insured was sober and temperate, subsequent bad habits constitute no bar to a recovery.[2]

§ 98. Where the by-laws of an insurance company were expressly made a part of the policy, and provided that if, subsequent to the making of the application, any new fact should exist, by a change of any fact disclosed in the application, or which increased the risk, or which it would have been necessary to state had it existed at the time when the application was made, the policy should be void, unless notice was given and consent obtained, it was held[3] that the insured was bound to the same degree of strictness in disclosing the existence of new facts, whether material or not, as in disclosing the facts existing at the time of making the application.

§ 99. In England, where much of the machinery of life

R. Q. B. 304; Lishman v. North Mar. Ins. Co. 28 Law Times, N. S. 165; Morrison v. Univ. M. Ins. Co. 27 Law Times, N. S. 791.

[1] Rose or Wemyss v. Med. Inv. & Gen. L. Ins. Soc. 11 Ct. of Sess. Cas. 2d series, 345.

[2] Reichard v. Manhattan L. Ins. Co. 31 Mo. 518; Horton v. Eq. L. Ass. Soc. N. Y. Com. Pleas, 2 Bigelow L. & Acc. Ins. Co. 108.

[3] Calvert v. Hamilton Mut. (F.) Ins. Co. 1 Allen, 308.

insurance varies greatly from that prevailing in this country, the companies usually issue a formal acceptance of the proposal for insurance. Bunyon says:[1] "In some companies this acceptance is unconditional, so that the premium be paid within the month; the letter of acceptance running to the effect that the proposal has been accepted, 'and that a receipt is ready at the office for the premium, upon the payment of which the assurance will commence; but that, if the same be not paid within thirty days, a reappearance and fresh certificates will be required.' In other companies the acceptance is qualified by the condition, not only that the insurance shall not commence until the payment of the premium, but that no material fact shall have occurred prior thereto, of a nature which ought to have been communicated to the insurers, if it had happened before the date of the proposal; or the policy is executed by the directors or trustees, with a condition to that effect indorsed upon it, and is then lodged in the hands of the officers or agents of the company, to be handed over to the assured upon the payment of the premium. This clause has been introduced to meet the case, which has occurred in practice, of a person making a proposal for an insurance which he did not intend to complete, and then taking advantage of any sudden occurrence likely to turn the chances in his favor; as, for instance, when he makes the same proposal to several offices, intending to insure with that which may offer the most favorable terms, and on the occurrence of an accident, or the appearance of a mortal disease affecting the person whose life is to be assured, completing all the insurances, although the last mentioned person was on the point of death at the time. Such a stipulation is perfectly fair, as without it the contract is unequal, for the company has no power to compel the completion of the insurance by the payment of the premium."

§ 100. It may properly be repeated here, that in what has been said as to representation and concealment, as to the

[1] P. 58.

relation of the referee to the applicant, and as to the necessity of declaring any change in circumstances, we have assumed that there was no express language in the policy or in the application upon the subject. But the American companies, almost without exception, now insert in their applications agreements which make all representations and statements, whether made by the applicant or the referee, warranties, and which expressly provide that any concealment or withholding shall forfeit the policy. Some companies also make the statements made to and by the medical examiner warranties. In such cases, many of the questions which we have been discussing, cannot arise. The agreement of the parties is then clear, and must be enforced.

CHAPTER IV.

THE SPECIFIC SUBJECTS OF WARRANTY AND REPRESENTATION.

§ 101. The warranties and representations usually contained in the application relate to the past and present health of the insured, and to his age, occupation, and residence; to the health of the relatives of the insured, including a statement of the number who are deceased, and the causes of their death; and to the name of the usual or last medical attendant of the insured, and to the fact whether any, and if so, what, other insurance has been obtained or applied for.

§ 102. **What is meant by good Health.**—The representation or warranty may be as to the general health of the person, or it may be as to whether he has had or been subject to certain specific diseases. The statement that the person is in good health, does not mean that he is in absolutely perfect health, but only that he is in a reasonably good state of health. It does not mean that he has not the seeds of disorder about him, nor even that he is not subject to any infirmity, so long as it is not an infirmity likely to produce death. Thus, in a very early case,[1] an assurance had been made on the life of Sir James Ross, warranted in good health at the time of making the policy. It appeared, upon the trial, that he had, twelve years before the application, received a wound in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or fæces, which fact was not mentioned to the insurer. He died of a malignant fever. All the physicians, who were examined for the plaintiff, swore that the wound had no connection with the fever, and

[1] Ross v. Bradshaw, 1 Bl. 312; s. c. Marshall on Ins. 770; Park on Ins. 933. The report in the text books is the most complete. As to this case, see 10 Ct. of Sess. Cas. 459, 462

that the want of retention was not a disorder which shortened life, but he might, notwithstanding that, have lived to be the common age of man; and the surgeons, who examined his body after death, said that his intestines were all sound. One physician who was examined for the defendant said, that the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but did not affect life; but, on the whole, he did not look upon him as a good life. Lord Mansfield, who tried the cause, in summing up the evidence to the jury, said: "Where there is a warranty, then nothing need be told; but it must in general be proved, if litigated, that the life was in fact a good one; and so it may be, though he had a particular infirmity. The only question is, whether he was in a reasonably good state of health, and such a life as ought to be insured upon common terms." It may well be doubted whether, at the present day, it would not be held, in such a case as the above, that even if there was no misrepresentation, there was a concealment or withholding of material facts.

So where[1] an insurance was made on the life of Sir Simeon Stuart, by a policy containing a warranty that he was in good health. It appeared in evidence, that though the insured was troubled with spasms and cramps, from violent fits of the gout, he was in as good health when the policy was underwritten as he had been for a long time before. It was also proved by the broker who effected the policy, that the underwriters were told that Sir Simeon was subject to the gout. It was shown that spasms and convulsions were symptoms incident to the gout. Lord Mansfield told the jury: "By the present policy, the life is warranted, to some of the underwriters, *in health*, to others, *in good health;* and yet there was no difference intended in point of fact. Such a warranty can never mean, that a man has not the seeds of disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness at the time, to make it an unequal con-

[1] Willis v. Poole, Park on Ins. 934.

tract." There was a verdict for the plaintiff. In Hutchison v. National Loan Assurance Society,[1] where there was a declaration that the party had no disease, or symptom of disease, and was then in good health, and ordinarily enjoyed good health, and that no material circumstance touching health or habits of life, with which the insurers ought to be made acquainted, was withheld, it was decided, that this imported a warranty only to the effect that the declarant was, and had been, according to her own knowledge and reasonable belief, free from any disease, or symptom of disease, material to the risk, and did not import a warranty against any latent imperceptible disease that could only be discovered by *post mortem* examination, or from symptoms disclosing themselves at an after period of time.[2]

§ 103. So where a policy had been allowed to expire and a renewal had been obtained, only on a general condition that the insured was in good health, it was held that this meant that he was in substantially the same state of health when the renewal was obtained, as when the insurance was originally granted. The Superior Court of the city of New York say, in deciding this case,[3] "We cannot say that 'good health' has so definite a meaning that it admits of application to only one physical condition. Its ordinary use in the community does not probably import a perfect physical condition once in one hundred times." On appeal the decision was affirmed, the Court of Appeals saying,[4] "The only question now open for our consideration is whether the judge rightly interpreted the condition of the renewal requiring that the assured should, at the time, be in good health. The word 'health,' as ordinarily used, is a relative term. It has

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[1] 7 Ct. of Sess. Cas. 2d Series 467; s. c. 17 Scotch Jur. 253.

[2] See this case more fully stated, *post*, § 104. It turns largely upon views of the law of warranty which are of doubtful soundness. In Sprott v. Ross, 16 Ct. of Sess. Cas. 1145, Clark, L. J., says: "If the pursuers mean to say that the non-statement of facts as to the health of the insured, which may appear on a *post mortem* examination to have affected the duration of the party's life, is to be held to endanger a policy, no policy in Great Britain would be secure, and such doctrine is untenable.

[3] Peacock v. N. Y. L. Ins. Co. 1 Bosw. 338.

[4] 20 N. Y. 293.

reference to the condition of the body. Thus it is frequently characterized as perfect, as good, as indifferent, and as bad. The epithet 'good' is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily or ordinarily mean that he is absolutely free from all and every ill which 'flesh is heir to.' If the phrase should be so interpreted as to require entire exemption from physical ills, the number to whom it would be strictly applicable would be very inconsiderable. In applying terms somewhat indefinite, reference should be had to the business to which they relate. This rule is very necessary when construing a language which like ours is defective in precision. The most important question in applications for life insurance is, whether the proponent is exempt from any dangerous disease, one which frequently terminates fatally. It is not usually deemed an objection that one has some slight physical disturbance, of which in all human probability he will soon be relieved, although it might possibly lead to a fatal disease. A slight difficulty, such as the sting of a bee, the puncture of a thorn, a boil, or a common cold, has sometimes induced complaints which have shortened human life; but this result is so unfrequent and improbable, that the mere possibility is disregarded in the business of life insurance. Now, in the case under consideration, the assured, while admitting that he had been afflicted with dyspepsia, with piles, and occasionally bleeding piles, palpitation of the heart, and nervousness, and had then a temporary cold, asserted, nevertheless, that he was then in good health. That he was in that condition was admitted by the company when it issued the policy. The admission would have concluded the company so that it could not have controverted the allegation of good health, unless upon proof of some complaint or tendency to disease, in addition to what was contained in the declaration of the assured, if he had strictly complied with the stipulation for the payment of the premium. When the policy was continued or renewed after forfeiture, upon the condition that the assured was then

in good health, he had a right to suppose that the company attached the same meaning to those words as in the original transaction. If not, and especially if more was required, it should have been so stated explicitly at the time. * * The judge was right in instructing the jury, as he did in effect, that if the same sanitary condition of the assured, as was represented in his declaration, continued up to, and existed at the time when the policy was renewed, the plaintiffs were entitled to recover." In Conver v. Phœnix Mutual Life Insurance Co. the court says that good health means, "that in the ordinary sense of the term the applicant was free from any apparent sensible disease or the symptoms of them, and that he was unconscious of any derangement of the functions by which health could be tested, in fact, that he was in a good state of health." [1]

§ 104. In a Scotch case,[2] where the person whose life was proposed had signed a statement that she was in perfect health, and that the general state of her health was good, and the party proposing the life made the declaration a fundamental condition of the policy, it was held to be a warranty that the life was not more than usually hazardous. Lord Fullerton says: "The declaration of Mrs. Armstrong bears that 'I am now in good health, and do ordinarily enjoy good health.' The pursuers hold these expressions to denote merely the good health of the declarant in the ordinary sense of the term; that is, freedom from any apparent sensible disease or symptom of disease, while the defenders maintain that these expressions amount to an absolute warranty, not only that she never felt herself to be affected with any complaint, or exhibited any symptom of complaint, but absolutely that whether felt or not, no disease in any form existed in her constitution. * * It all turns on the meaning which in such a contract shall be attached to the term 'good health.' Does it mean external sensible health, and

[1] 6 Chicago Leg. News, 144; U. S. C. C. Minnesota. As to renewal upon condition of good health, see Bissell v. Am. Tont. L. Ins. Co. 2 Bigelow Ins. Cas. 150.

[2] Hutchison v. Nat. Loan Ass. Soc. 7 Ct. of Sess. Cas. 2d Ser. 467; s. c. 17 Scotch Jur. 253.

the absence of any external sensible symptom of ailment; or the total absence of any defect or disorder in the constitution, whether felt, rendered sensible or not?" After inferring, from the connection of the stipulation with others, that it was intended to refer to known and external indications, he continues: "Let a fair, not to say a liberal, construction be applied to the term 'good health.' It occurs in the description of the state of a living individual which state, in so far as evident to others or perceptible by himself, can alone form the subject of description; and when so employed, does it denote anything more than the absence of any ostensible, or known, or felt, symptoms of disorder? Would any man, however scrupulous in the use of terms, hesitate to declare himself on soul and conscience in perfect health, so long as he felt himself in the perfect and healthy exercise of all the functions by which health could be tested, and was utterly unconscious of any derangement by which these functions were likely to be impeded? Or could it be, with any show of reason, charged against him as an untruth, because, for anything he knew, there *might* by *possibility* exist at the moment some hidden defect, or malformation, or morbid derangement, inoperative externally for the time, but sure at some future period to prove fatal? If this were requisite to justify the declaration of 'good health,' it is clear that such a declaration never could, with certainty, be made." He refers to Duckett v. Williams,[1] and says, that where one represents the health of another to be good, he will be held to warrant the truth of that statement, and will not be permitted to urge that he was ignorant of its untruth, but that that case does not hold that "good health" excludes the existence of latent, unknown defects. A representation that the life was a "good life," when, in fact, he was a "drunken fellow," was early held to avoid the policy.[2] A life which is not insurable, except at an advanced premium, is not a healthy life, within a warranty to that

[1] 2 Cr. & M. 348; s. c. 4 Tyrwh. 240.
[2] Cleeve v. Gascoigne, Chancery, April, 1758, cited Weskett on Ins. 335.

effect.[1] Where the statements were held to be warranties, the court say:[2] "If untrue, the plaintiff, and especially his wife, who was his agent to make the application, must have known them to be so, and as they were not disclosed to the company, at the time the insurance was effected, the plaintiff is justly chargeable with fraud in procuring an insurance upon such a life. * * And it would seem that there can be but one opinion on the question of fraud, if Mrs. Kelsey's letter to her mother, but three days previous to her application for the policy, is to be regarded as true. In that letter she expressly states, that the doctor says her lungs are healing, and that he thinks, if she lives till spring, she shall get well. And the whole letter indicates that, in her opinion, there was doubt as to her living till spring, in consequence of the condition of her lungs. Now, if it be admitted that her hopes of final recovery were so strong as to induce her to say, in her application three days after, that she only had a slight bronchial difficulty in winter, how could the husband, knowing, as he must have done, what the doctor said of her lungs, allow her to sign an application for insurance upon her life, in which it is said she never had had any serious illness."[3]

§ 105. **Serious Illness and Disease tending to Shorten Life.**— It is almost universal that the inquiry is made whether the person to be insured has had any serious illness, or any disease tending to shorten life.[4] With reference to diseases tending to shorten life it has been held[5] that it is not to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life, is a "disorder tending to shorten life," from the mere circumstance that he after-

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[1] Brealey v. Collins, 1 You. 317. [2] Kelsey v. Univ. L. Ins. Co. 35 Conn. 225.

[3] In almost all the modern cases where there is alleged to be a breach of warranty or a concealment as to any specific disease, the general warranty as to health which is embraced in the affirmative answer that the insured then has and usually enjoys good health, is broken. See Smith v. Ætna L. Ins. Co. 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116; Horn v. Amicable L. Ins. Co. 64 Barb. 81.

[4] Lindenau v. Desborough, 3 C. & P. 353; Swete v. Fairlie, 6 C. & P. 1.

[5] Watson v. Mainwaring, 4 Taunt. 763.

wards dies of it, if it be not a disorder which generally has that tendency. In the case referred to, it was proved by a physician to whom the insured had applied for advice, that his disorder was an affection of the bowels; that this disease may proceed from either of two causes, the one a defect of some of the internal organs, the other a mere dyspepsia; that the first would tend to shorten life; that the second, though it renders the patient uncomfortable, does not generally, unless it increases to an excessive degree, tend to shorten life, and that the complaint with which the insured was afflicted, was not the organic dyspepsia. Several other medical men stated that they had attended him since the policy had been effected, and that he was then quite free from the disorder. On the other hand, several medical persons stated, as witnesses for the defendants, that they had seen him previously to effecting the insurance, and that they then considered him as a failing man. It was left to the jury to say whether the patient's complaint was the organic dyspepsia, and, if it was not, whether the dyspepsia under which he labored was, at the time of effecting the policy, of such a degree that by its excess it tended to shorten life. The jury found that it was neither organic nor excessive, and gave a verdict for the plaintiff. On a motion for a new trial, it was contended that since the assured afterwards died of the same disorder which he had before effecting the policy, that circumstance was conclusive proof that he was then afflicted with a disorder tending to shorten life; but the court held to the contrary, saying that it was a question for the jury, and Chambre, J., remarked: "All disorders have more or less a tendency to shorten life, even the most trifling; as for instance, corns may end in a mortification; that is not the meaning of the clause; if dyspepsia were a disorder that tended to shorten life within this exception, the lives of half the members of the profession of the law would be uninsurable."

§ 106. In an Irish case[1] in which the application stated that the party had no disease, or habits having a tendency

[1] Rose v. Star Ins. Co. 2 Irish Jurist, O. S. 206.

to shorten life, it was held that not stating a disease, which did not have a continuing tendency to shorten life, did not render the policy void. In an English case [1] the assured, in 1855, signed a declaration, that he had not had certain diseases named, and "that I am now in good health and do ordinarily enjoy good health, and that I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous," unless what was stated in answer to certain specific questions was so considered. He died in 1856. In 1853 and 1854, he had had two very severe bilious attacks; the physician who attended him said there was nothing in them tending to shorten life, and that his health was as good after them as before. Two other physicians, one of whom had seen him during the last of those illnesses, thought that it did tend to shorten life and render it not eligible for insurance, but it did not appear that they had ever so told the insured, though one of them had cautioned the father that if the insured recovered, great care would be needed to prolong his life. The judge told the jury, that if the assured honestly believed, at the time he made the declaration, that these attacks had no effect upon his health, and did not tend to shorten his life, or to render insurance of it more than usually hazardous, the fact that he knew that he had had these attacks, even though without his knowledge they had such tendency, did not avoid the policy. On appeal this direction was held correct, the decision being placed upon the language of the policy, and the question being whether the statement that he was "not aware of any disorder tending to shorten my life," referred not merely to the knowledge of the assured of the disorder, but also to his knowledge that it tended to shorten life; the court held that he must be shown to have known both facts before the policy could be avoided.[2]

[1] Jones v. Provincial Ins. Co. 3 C. B. N. S. 65; s. c. 3 Jur. N. S. 1004; 26 L. J. C. P. 272.

[2] In the course of the argument, Creswell J., said: "The question is who is to be the judge as to whether or not a particular disorder has a tendency to shorten life, or to render an assurance thereon more than usually hazardous? Is the party's own opinion and

§ 107. **What are Diseases.**—A slight, temporary disturbance, unless presenting characteristics of a dangerous disease, is not a severe sickness and need not be disclosed; but good faith requires that information of repeated and frequent physical disturbances should be given at the time of the application.[1] When the insured stated that he had not had certain specified diseases, it was held[2] erroneous to charge the jury that if he had "had any of the affections mentioned in said question, but of so trifling a character as hardly to be classed among diseases, and as not to be remembered at the time of the application, it might not be a substantive disease so as to have an influence upon the length of life of the party making the application, or such as would be noticed by the medical examiner as disease, and in that case the answer to said question might not be a mis-

judgment to be the guide, or is it to depend upon the opinion and judgment of somebody else? Knowing all the circumstances attending the illness, the assured may honestly think it unimportant. Must he take the risk of other people thinking that it has a tendency to shorten life." Cockburn, C. J., says: "If it amounts to a warranty, the knowledge of the party would be immaterial. But where the party says, 'I am not aware of any circumstance having such and such a tendency,' does he do more than pledge his own opinion and belief?"

In Nat. L. Ins. Co. v. Minch, 6 Lans. 100, reversed 2 Ins. Law Jour. 820, there was a question of fact involved, as to whether there had been a breach of the warranty that the insured had, to the best of her knowledge and belief, not had any disorder, infirmity or weakness tending to impair her constitution.

In a Scotch case, quoted in Taylor's Med. Jur. 740, a policy was set aside for misrepresentation and concealment. In the application, in December, 1833, the insured had stated that she was in good health, and was not afflicted with any disease or disorder tending to shorten life. She referred to her physician, who stated that he had known her for ten years, and had been in the habit of attending her professionally; that she was last ill in the September previously, that her indisposition was acidity of the stomach; that she was not affected with any disease of a nature to affect her general health, that she was then in perfect health, not subject to fits or any affection of the head, except occasionally to light headache from acidity of the stomach; he knew of no circumstance tending to impair her health or shorten her life. She died from apoplexy on September 3, 1834, and the company then ascertained that between September 19, and December 3, 1833, the physician had paid her thirty-five professional visits, most of them of long duration; that she had been frequently bled, her head shaved and leeches applied; after the insurance she had had constant attendance, and early in 1834, had had several fits of epilepsy. Medical men stated that her declaration and the physician's statement did not set forth her true condition, and the policy was set aside.

[1] Conver v. Phœnix Mut. L. Ins. Co. 6 Chicago Legal News, 144; U. S. C. C. Minnesota. And see Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law. Jour. 415.

[2] Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223.

representation under a fair and reasonable construction." It was erroneous so to charge for "if the life insured had not had the *diseases* mentioned in the question, then no affection which he might have had, no matter how near akin to, or how closely resembling or approximating the diseases mentioned, would make his negative answer to the question a material misrepresentation. But if he had had any affection amounting to a *disease* of the kind mentioned, his negative answer would be a material misrepresentation, no matter how 'trifling' the character of the affection, nor whether it was remembered at the time of the application, nor whether it would have any influence on the length of his life, nor whether it would be noticed by the medical examiner; and if there was an affection amounting to such disease, the question of the materiality of the negative representation would not be open to the jury, as the instruction would appear to indicate."

§ 108. **Importance of Careful Use of Terms.**—Important results may follow from an apparently slight change in the language used. In the case of a warranty that the insured had no disease tending to shorten life, it is for the jury to say whether the disease in fact had such a tendency,[1] while as already shown,[2] the language may be such as to render it not only necessary that it should have such tendency, but that the insured should know that it had such tendency. In delivering the opinion in a case where a question was raised as to the meaning of representations, Cockburn, C. J., says,[3] "The declaration is that the particulars given in answer to the questions propounded by the company 'are correct and true throughout,' that the proposal and declaration shall be the basis of the contract; 'and if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, * * the policy shall be absolutely null and void.' It is sought, on the part of the defendants, to construe this declaration in the disjunctive, so

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[1] Lindenau v. Desborough, 3 C. & P. 353.

[2] *Ante*, § 106.

[3] Fowkes v. Manch. & Lond. L. Ass. & Loan Assoc. 3 B. & S. 917; s. c. 32 Law Jour. Q. B. 153; 11 Week. Rep. 628; 8 L. T. N. S. 309.

that, not only if any fraudulent concealment or designedly untrue statement is contained in the answers to the questions, the policy is to be void and the premiums forfeited, but that if any incorrect or untrue statement, however honestly and sincerely made in the belief of its truth, occur in those answers, the same consequences are to follow. The first observation in answer is, that, upon that construction, the clause which relates to fraudulent concealment and designedly untrue statement, is superfluous and unnecessary, because it is only a reiteration, *in extenso* of that which is involved in the former clause, which requires the particulars to be correct and true. * * Inasmuch as, upon the construction contended for, the latter clause is wholly unnecessary, I think we ought to construe that clause as merely explanatory of what is meant by the terms, 'correct' and 'true' in the former clause. A layman about to effect an insurance would read such a document when submitted to him for his signature, in the following sense: 'I agree that my answers to the questions propounded to me by the company shall be the basis of the contract between us; that is to say, if I am guilty of any fraudulent concealment, or designedly untrue statement in those answers, the policy shall be null and void, and not only that, but the premiums shall be forfeited.' Then it is said that, if we turn from the declaration to the policy, we shall find that the language of the policy varies from the declaration, and it is argued that the policy is the true statement of the contract between the parties. But the declaration is declared to be as much a part of the policy as if it had been set forth therein; and the language of the policy is, that if any statement in the declaration is 'untrue,' the policy shall be void, and all moneys paid in respect thereof be forfeited. To ascertain the meaning of the words 'if any statement in the declaration is untrue,' we must refer to the declaration itself, which is made the basis of the contract; and reading those words with the light thrown upon them by the language in the declaration, I think the true construction of the language of the defendants is, that, in

order to avoid the policy, the statement must be designedly untrue, that is, untrue to the knowledge of the assured. Then, it is said that there is another paragraph in the policy which must be read in connection with the preceding, 'or if the assurance by the policy made, should have been effected by or through any wilful misrepresentation, concealment or false averment whatsoever, &c.' It appears to me, that, either that is a reiteration of the language of the declaration, or, if it is more, we must see how we can construe it so as to reconcile it with the declaration; which, I think, may be done by construing it as referring to any misrepresentation, concealment, or false averment, made in the course of the negotiations, between the party proposing to insure and the insurers. The answers given to the original questions might lead to further questions, and if in answer to them there should be wilful misrepresentation, concealment, or false averment, it would be met by this part of the proviso. We may thus read the declaration and the proviso in the policy together, so as to make one consistent whole. In the result I am of opinion that the true construction of the policy and declaration is, that so long as the person proposing to insure makes a statement honestly, which he believes to be true, although it may turn out to be incorrect in fact, the policy is not avoided."

§ 109. **What is meant by Serious Illness.**—The question has been raised whether an answer that the applicant has never had any serious illness, is a warranty that he has never had an illness which was in point of fact serious, or that he has never had one which he regarded as serious. On principle it would seem that if the answer is unqualified, that he has never had a serious illness, it must mean that he has never had an illness, which in point of fact was serious, and such is the opinion of the Supreme Court of the United States. In a recent case they hold[1] that the question whether an injury was serious is not to be determined exclusively by the im-

[1] Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222; s. c. 1 Ins. Law Jour. 607.

pressions of the matter at the time, but its more or less prominent influence on the health, strength, and longevity of the party is to be taken into account, and the jury are to decide, from these and the nature of the injury, whether it was so serious as to make its non-disclosure avoid the policy. The court say: "It is insisted by counsel for the defendant, that if the injury was considered serious *at the time*, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries which, at the moment, are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and, if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over it completely, without leaving any ill consequences, in a few days, it is clear that the serious aspect of the case was a mistake. Is it necessary to state the injury, and explain the mistake to meet the requirements of the policy? On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations. This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed. * * "We are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them," which was, that if

the effects were temporary, and had entirely passed away before the insurance, and if it did not affect the health or shorten the life, the non-disclosure of the fall was no defense; but if the effects were not temporary, but remained at the time of the insurance, or if it affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure, though unintentional, was fatal.

In a case in Iowa, the same construction is put upon a question as to "any accidental or serious personal injury."[1] The decision in a New York case,[2] that "If he did not consider it serious, it in his opinion did not call for an affirmative answer," can hardly be considered correct as a general rule.

§ 110. **Local Disease.**—A tubercular affection of the lungs, or tubercles upon the lungs, or tubercles on the brain, or consumption, either of them constitute a local disease, as matter of law, within the meaning of the word "local," as used in the question to the applicant, whether he has a local disease,[3] and it is not enough for the court to instruct the jury that, if the insured had a serious local disease, there could be no recovery. The court should go further, and instruct them whether any particular disease, as to the existence of which evidence was offered, came within the meaning of the term local disease.

Where the question was, if he had "ever had any illness, local disease, or injury in any organ," and the answer was, no, it was held that the policy was forfeited, it being shown that he had had disease of the eyes, so as to require medical

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[1] Wilkinson v. Conn. Mut. L. Ins. Co. 30 Iowa, 119.

[2] Hogle v. Guardian L. Ins. Co. 6 Rob. 567; s. c. 4 Abb. N. S. 346; *ante*, § 51.

In Conver v. Phœnix Mut. L. Ins. Co. 6 Chicago Leg. News, 144, U. S. C. C. Minnesota, one of the points of objection was, as to the answer to a question about "any severe sickness." The insured, just previous to the application, had been prostrated and remained unconscious for some time, and was attended by two physicians.

In Price v. Phœnix Mutual L. Insurance Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223, one of the questions raised was whether gastritis and chronic gastritis were synonymous, and whether either came within the meaning of the terms, a "severe sickness or disease."

[3] Scoles v. Univ. L. Ins. Co. 42 Cal. 523.

care for nearly a month, and had while in the army had either a disease of the eyes or received an injury to them; that he was sent to the hospital, where he remained for at least a month, and after being at home a time on furlough, was again sent to the hospital, and was discharged from the army for physical disability.[1] Primary syphilis is a disease of the urinary organs.[2]

§ 111. **Subject to Disease.**—With reference to the language used, it is further to be observed, that there is a marked distinction between a statement that he has not had a particular disease mentioned, and a statement that he has not been or is not subject to such disease. Perhaps also the statement that he has not been afflicted with a particular disease, carries a different meaning from a statement that he has not had such disease. Bunyon says,[3] in construing a clause with respect to a specific disease, "the first question is, whether the words of the clause amount to a declaration that the party has never been attacked by it, or that he is not habitually or constitutionally subject to it. Should the warranty amount to the former, any instance in which he has been so attacked, however slight the seizure, and however unimportant it may appear, as not having produced any permanent effect upon the constitution, will still avoid the policy. But when the malady is of such a nature that the assured was not aware that it was that from which he suffered, his statement that he has not been afflicted with it cannot be treated as untrue."[4]

§ 112. In support of these views, it has been held that when the warranty is that the insured has not been afflicted with nor subject to the gout, vertigo, fits, &c., such warranty is not broken by the fact that the assured had had an epileptic fit in consequence of an accident; to vacate such a policy, it must be shown that the constitution of the assured was natu-

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[1] Fitch v. Am. Pop. L. Ins. Co. 2 N. Y. Supreme R. 247.

[2] Eddington v. Ætna L. Ins. Co. Supreme Ct. of N. Y. MSS.

[3] P. 47.

[4] See Fowkes v. Manch. & Lond. L. Ins. Co. 3 F. & F. 440.

rally liable to fits, or by accident or otherwise has become so liable.[1] Lord Abinger says, "If the cnly fits of which proof were given had been the Macclesfield fits, I should have said there was no breach of this warranty; for the interpretation I put on a clause of this kind is, not that the party never accidentally had a fit, but that he was not, at the time of the insurance being made, a person habitually or constitutionally afflicted with fits; a person liable to fits from some peculiarity of temperament, either natural, or contracted from some cause or other during life." He left it to the jury to say whether the insured had had other fits than one, and whether that one was the result of accident, and did not lead to any recurrence of fits in after life. In a later case, which was one of insurance against accidents,[2] the proposal stated that the insured was not subject to "epileptic or other fits." The evidence showed that fainting fits, to which he was subject, were not deemed "fits" by medical men, and it was therefore held that the representation was not untrue. In the same case[3] on a previous trial, a question was raised whether a a rupture was a violation of a representation that there was "no circumstance or information touching his habits of life, with which the directors ought to be made acquainted, as rendering him peculiarly liable to accidents," and it was held at *nisi prius*, that "habits" included any infirmities, such as ruptures, which might incapacitate a man from getting out of the way of danger as nimbly as others could; but the question, though raised on appeal, was not decided.

Where the applicant answered that he was not afflicted with gout, and it appeared that he had had two slight attacks of suppressed gout, and he subsequently died of gout, but there was no evidence that he knew he had had gout, it was held[4] that the answer was not untrue, unless he had been sensibly afflicted with gout. A man subject to the gout is

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[1] Chattock v. Shawe, 1 Mood. & Rob. 498.

[2] Shilling v. Acc. Death Ins. Co. 1 F. & F. 116.

[3] 27 L. J. Exch. 16. See *ante*, § 17, note 1.

[4] Fowkes v. Manch. & Lond. L. Ins. Co. 3 F. & F. 440.

a life capable of being insured, if he has no sickness at the time to make it an unequal contract.[1] But a man predisposed to dyspepsia to such a degree as to produce bodily infirmity, is not sound and healthy.[2]

§ 112. In a modern English case,[3] the facts and the law are thus stated by Cockburn, C. J., "One of the documents which formed the basis of the contract was that which is called the personal statement; and, amongst the questions therein contained, we find the following: 'No. 4. Whether had since infancy any and what other disease requiring confinement?' To that the assured answers simply and emphatically, 'No!' If that answer had stood alone, with nothing to qualify it, it is clear, beyond all controversy, upon the evidence which was given at the trial, that it was an untrue answer in point of fact. It remains, therefore, to be seen whether there is anything in the answers to the subsequent questions so to qualify that negation as to make it reconcilable with truth, and to except it out of the operation of the fourth condition. The 8th question is, 'How often has medical attendance been required?' To which the answer is, 'Two years ago.' Then comes the 9th question, 'How long did such attendance continue?' Answer, 'About one week.' The 10th question is, 'For what disease or diseases?' Answer, 'Disordered stomach.' The eleventh, 'For what period confined to the house or the bed?' Answer, 'A week.' The twelfth, 'How long is it since these circumstances occurred?' Answer, 'One year.' And the thirteenth, 'Name and address of the medical attendant or attendants, employed on occasion of such disease?' Answer, 'Dr. Roper, Rock Ferry.' It is contended on the part of the plaintiffs, that the answers given to these latter questions so qualify the denial contained in the answer to the fourth question, as to

[1] Willis v. Poole, Park on Ins. 934.

[2] N. Y. L. Ins. Co. v. Flack, 3 Md. 341.

[3] Cazenove v. Brit. Eq. Ass. Co. 6 C. B. N. S. 437; s. c. 5 Jur. N. S. 1309; 1 L. T. N. S. 484; 28 L. J. C. P. 259; and on appeal, 29 L. J. C. P. 160; 6 Jur. N. S. 826; 8 W. R. 243.

make that denial consistent with the truth. I, however, think they do not. The only illness to which the assured refers in these answers, is that which occurred in December, 1855, when he was attended by Dr. Roper. He makes no allusion whatever to the last and more serious illness which occurred at Birmingham, when he was attended by Dr. Fletcher and Dr. Palmer, and also by a surgeon. The effect of all the answers taken together amounts to this: there is a positive denial of the assured's having since infancy, had any disease (other than those mentioned in the preceding question), requiring confinement, with an admission of his having had a year ago one disease, viz., a disordered stomach, which continued for a week, and for which he was attended by Dr. Roper. That clearly is not true; for, within a month after, he had a serious attack, which placed his life in imminent danger, and during the continuance of which he was attended by no less than three medical men." Byles, J., adds: "In his answer to the fourth question in the personal statement, the assured in effect says, 'I never had since infancy any disease requiring confinement.' Clearly that is not an omission, but a positive negation of the illness at Birmingham. But, in his subsequent answers, the assured goes on to say, 'I was confined to the house or bed for a week about one year ago; and my medical attendant on that occasion was Dr. Roper.' He thus introduces one exception, viz., the illness at Birkenhead in December, 1855, leaving the general negation of the Birmingham illness still remaining. That statement is untrue." On the appeal, Blackburn, J., says, "He is asked in the personal statement, how often he has had medical attendance, and he answers, once from Dr. Roper; the fact being that he had had medical attendance twice, and the second time was attended by three different doctors." The sixth question being, "how often has medical attendance been required?" and the answer being, "one year ago," Wightman, J., says, "Surely he must be taken to mean to say in answer, 'Once, one year ago,'" while Pollock, C. B., says, "The answers, indeed, may

be said to be true in one sense, for so much as is stated in them is not false, but it is nevertheless an untrue statement. It is just as untrue as when a person is asked how old he is, and he states in answer a number of years less than his true age. It is trifling to say that that is a true answer which requires something to be added to it to make it true."

§ 113. In one English case,[1] where the question of health was involved with other questions on which the court was divided in opinion, the plaintiffs reassured with the defendants the life of a person which they had themselves previously assured to a large amount. When the proposition to reassure was made, the defendants sent to the plaintiffs a printed form, containing nineteen questions relative to the age, health and habits, &c., of the person whose life was to be reassured, and a declaration to be made by him, that he was then in good health, and not afflicted with any disease tending to shorten life, and to be signed also by the plaintiffs, agreeing that if any untrue statements were contained in such declaration or the answers to the questions, the assurance should be void. When this document was sent by the defendants, they had filled up the answers to the first five questions, but the rest were included in a "brace," against which was written, "for these particulars see copies of Britannia papers attached." At the foot of these words the plaintiffs' agent had signed his name. Neither the plaintiffs, nor the person whose life was insured, had signed the printed paper in any other part, and blanks were left for the signatures to the declaration. This document was returned to the defendants, with copies attached of the papers delivered to the Britannia office on the original assurance, which were properly signed by the person insured. The defendants signed the policy, which recited that the plaintiffs had delivered to the defendants a declaration signed by them, setting forth the past and present state of health of the person whose life was assured,

[1] Foster v. Mentor L. Ass. Co. 3 E. & B. 48; s. c. 24 Eng. Law & Eq. 103

and stated that such declaration was to be the basis of the contract, and, if anything untrue were averred in it, the policy was to be void. The plaintiffs accepted this policy, and paid the premiums upon it. Though the statement was true when the original was signed, yet at the time when this reassurance was effected, the insured was living abroad, and was efflicted with a mortal disease, of which he soon afterwards died; but this fact was unknown both to the plaintiffs and the defendants. The defendants pleaded that the plaintiffs untruly stated that the person insured was, at the time of making it, in good health. The judge directed the jury to say whether the meaning of the parties was, that the plaintiffs undertook that the insured was then in good health, or that the defendants were to decide whether they would reassure upon the statements appearing in the original papers; and he handed to the jury the whole of the documents in evidence, in order that they might form their opinion, whether the signature applied to the declaration, or only to the particular questions against which it was placed. The jury found for the plaintiffs, and, on a motion for a new trial, the court were equally divided; Campbell, Coleridge and Wightman holding that the question, whether the plaintiffs had signed the declaration, was for the jury, and not for the judge, to decide; but Erle, holding that the plaintiffs, suing on the policy, could not give parol evidence to contradict the statement contained in it; that the declaration had been signed by them; and Wightman and Erle holding, that the jury were misdirected in not being told that the plaintiffs, having accepted without objection the policy containing the recital that they had signed the declaration, were, *prima facie*, concluded by that recital.

§ 114. **Spitting Blood.**—Another usual warranty relates to spitting blood, a question put to extract information indicative of disease of the lungs. It is held that if the inquiry is, whether the insured has ever spit blood, it is his duty so to state, though he may not believe it came from the lungs. It is not for him to judge as to the origin, but he should

inform the company of the fact, and let them make such further inquiries of himself or others as they think proper. In an English case,[1] the assured stated that "he was at that time in good health, and not afflicted with any disorder * * tending to shorten life; * * that he had not had any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs;" the statements were made warranties. The defendant proved at the trial that about four years before the policy was effected, the insured had spit blood, and had subsequently exhibited other symptoms usual in consumptive subjects; and that he died of consumption three years after the date of the policy. The judge stated to the jury that it was for them to say whether, at the time of his making the statement, set forth in the declaration, the insured had had such a spitting of blood and such affection of the lungs and inflammatory cough, as would have a tendency to shorten life; but it was held that this was a misdirection; for, although the mere fact of the insured having spit blood, would not vitiate the policy, yet he was bound to state that fact, in order that the company might make inquiry whether it was the result of the disease called spitting of blood. Pollock, C. B., says: "By the expression 'spitting of blood' is, no doubt, meant the disorder so called, whether proceeding from the lungs, the stomach, or any other part of the body; still, however, one single act of spitting of blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought therefore to be stated;" and Alderson, B., adds: "Lord Denman certainly does not appear to have sufficiently called the attention of the jury to the distinction between those disorders, respecting the existence of which, at the time of executing the policy, the assured was called on to make a specific declaration, and those which might have formerly existed. By 'spitting of blood' must, no doubt, be understood a spitting of blood as a symptom of disease tending to shorten life; the mere fact is nothing; a man cannot have a tooth pulled

[1] Geach v. Ingall, 14 M. & W. 95.

out without spitting blood. But, on the other hand, if a person has an habitual spitting of blood, although he cannot fix the particular part of his frame whence it proceeds, still, as this shews a weakness of some organ which contains blood, he ought to communicate the fact to the insurance company; for no one can doubt that it would most materially assist them in deciding whether they should execute the policy; and good faith ought to be kept with them. So, if he had had spitting of blood only once, but that once was the result of the disease called spitting of blood, he ought to state it, and his not doing so would probably avoid the policy. Again, suppose this man had an inflammation of the lungs which had been cured by bleeding; many physicians would, perhaps, say that it was an inflammation of the lungs of so mitigated a nature as not to tend to shorten life; still, that would be no answer to the case of the defendants; for it is clear that the company intended that the fact should be mentioned. As to the word 'cough,' it must be understood as a cough proceeding from the lungs, or no one could ever insure his life at all; and, indeed, it is so expressed in the policy—'cough, or other affection of the lungs.' Again, it is obvious that the insurance company meant to guard against the disease of dysentery. Now, a man may have had a dysentery, and been cured of it; still the office should know of the circumstance; and, indeed, that disorder may have been mentioned by name, as being one of a nature likely to return. All these instances shew that it was not intended to restrict the statement of the assured to disorders having a tendency to shorten life at the moment of executing the policy; what the company demanded, was a security against the existence of such diseases in the frame." Rolfe, B., adds: "I have no doubt that, if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it. The fact should be made known to the office, in order that their medical adviser might make inquiry into its cause."

§ 115. Two cases bearing upon this question have been decided in Massachusetts. In one[1] the disease as to which there was alleged to have been a misrepresentation, was specifically "spitting of blood," and the court, on appeal, say: "The court did instruct the jury that the repeated spitting of blood, accompanied by a cough, was so far an indication of disease, that if the applicant had suffered from it, he was bound to have so stated; that if he was subject to occasional spitting of blood, accompanied by a cough, he was bound to have stated that fact; and that the same was true if he had spit blood in a single instance, if recent, and such as to excite apprehension in his own mind that it was the result of disease. Considering the various forms and degrees in which the spitting of blood with a cough may manifest itself, the uncertainty as to its source and cause, and the character of the facts which the testimony in the case tended to prove, we cannot say that the rulings of the court ought to have gone farther than this in favor of the propositions of the defendant. The mere raising of a small quantity of blood with a cough, in a single instance, is not necessarily an indication of disease, or a material circumstance, so that such an occurrence, however slight, at any time during the previous life of the applicant, would make his answer such a misrepresentation as to require that the court should so declare it as a matter of law. * * It was for the jury to determine upon the evidence, and in view of all the circumstances under which the spitting of blood by Andrew Campbell was testified to before them, whether his representations in regard to it, in his answers to the inquiries of the company, varied from the truth in any respect material to the risk. It was for them to judge not only of the fact of variance, but of its extent and materiality."

After a subsequent trial, the question came up on appeal in a little different form, and the court, after ruling that the answers were made material by the form of the policy, continue. "The only question for the jury on this branch of the

[1] Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381.

case therefore was, whether these representations were substantially untrue; that is to say, whether at or before the time of making the application, the assured actually had either of these diseases or infirmities. * * * Applying this rule to the evidence stated in the report, it was for the jury to decide whether 'chronic bronchitis' or 'bronchial difficulty,' or any other bodily affection or condition to which the assured was found by them to have been subject, amounted to bronchitis, consumption, disease of the lungs, or some other of the infirmities stated in the application and relied on by the defendants; and whether the spitting of blood by him, if proved to have taken place, was under such circumstances as to indicate disease in his throat, lungs, air passages or other internal organs." But they could not, while doing this, assume to find that the diseases were not material.

In the other case,[1] where spitting blood was connected with other symptoms of disease, the court say: "Upon the facts in the case it is not important whether the proposal or application is considered as a warranty or representation. As a warranty it was so manifestly untrue, and as a representation there was manifestly so material a misrepresentation, that in either view the policy is invalid. The fact is established that at the time of making the proposal and issuing the policy, the insured was rapidly declining in a confirmed consumption, and had been so declining for five months previous, and continued to live but about two months after this time. Yet, in answer to the tenth interrogatory, the insured expressly denied that he, or any of his family, had been afflicted with pulmonary complaints, consumption, or spitting of blood. In answer to the seventeenth interrogatory, the insured said that he could not say that he was afflicted with any disease or disorder. It is immaterial that the insured did not suppose himself in a consumption; the fact was so, and the statement was manifestly contrary to the fact, which was a most material and conclusive fact.

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[1] Vose v. Eagle L. & Health Ins. Co. 6 Cush. 42. As to spitting of blood, see also Mut. L. Ins. Co. v. Wager, 27 Barb. 354.

The fact of the general debility of the system, stated by the insured, was not important in the manner in which it was stated; as it might arise from a variety of causes not materially affecting the risk, and would not, therefore, by any means give the insurers the information wanted. The insured was asked directly whether he was at the time affected with any disease or disorder, and what; to which he answered, that he could not say that he was afflicted with any disease or disorder; but he could have stated the symptoms of consumption which he had, and which he knew he had, and which he had had for five months previous, and which were certainly most material and important to be known by the insurers."

In a recent case[1] where the insurance was effected in January, 1867, with a warranty against spitting of blood, it appeared, as the court say, that the insured "was wounded twice while in the army; that on his passage from New York to California, in November, 1865, he had a slight hemorrhage which lasted 'on and off' for two days, and upon his arrival at Aspinwall had to be carried on a stretcher from the steamer; to be carried in a like manner from the cars at Panama to the steamer on the Pacific side; and was not able to go with his company to Arizona. That, in March, 1866, he had a hemorrhage at his barracks in California which lasted nearly ten days, during which he raised blood twice a day, morning and evening, and was, from the effects of the hemorrhage, confined to his bed several weeks, and it was about a month before he was able to go out in the open air. That, during the first hemorrhage, he spit blood more than ten times; that, in his opinion, it came from the lungs, and that he did not recover entirely from the attack before he had the second attack. That the spitting of blood during the second attack lasted about ten days; that he was confined to his bed about a month; that he thought the spitting of blood proceeded from his lungs; that he had a cough before the first attack, a cough for two years after the second

[1] Foot v. Ætna L. Ins. Co. 4 Daly, 285.

attack, and that the second attack was much more severe than the first. It further appeared that he had another attack of hemorrhage in August, 1868, and that, in September, 1869, he died of the disease of consumption." "The probability is a strong one that his lungs were diseased at the time that he effected the insurance, whatever his own impression or belief in the matter may have been. From his own account of the attacks he had had, he could not answer truthfully that he had never had the disease of spitting of blood, or any disease of the lungs; and good faith required, when the inquiry was propounded to him, either an answer in the affirmative or a statement of what had occurred." Where the applicant was shown to have had a chronic cough with expectoration streaked with blood, and night sweats, it was held that the failure to mention these facts forfeited the policy.[1] Where the warranty was that the insured had not had spitting of blood or consumption, and the evidence showed that he had had spitting of blood and had at the time consumption, and that he knew that he had had spitting of blood and had sufficient reason to believe that he then had consumption, the policy was held void.[2] So an answer that the insured usually enjoyed good health, and is then in good health, is shown to be false by proof that he had for months prior had spitting of blood.[3]

§ 116. **Various Specified Diseases.**—Where the question was: "Has the party ever had any of the following diseases?" naming several, and among others, rheumatism, to which the answer was "never," it was held that "the rheumatism referred to in the question is the *disease* of rheumatism. Any rheumatic affection not amounting to the *disease* of rheumatism, is not comprehended in its terms, any more than the spitting of blood occasioned by a wound of the tongue, or

[1] Horn v. Amicable L. Ins. Co. 64 Barb. 82.

[2] Mut. Ben. L. Ins. Co. v. Miller, 39 Ind. 475; s. c. 2 Ins. Law Jour. 101.

[3] Smith v. Ætna L. Ins. Co. 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116. See, also, Day v. Mut. Ben. L. Ins. Co. 1 Wash. Law Rep. 22; Scoles v. Univ. L. Ins. Co. 42 Cal. 523; Fried v. Royal Ins. Co. 47 Barb. 127. Affirmed, 2 Ins. Law Jour. 120.

the extracting of a tooth, is the *disease* of 'spitting of blood,' mentioned in the same question. The life insured had the right to answer the question upon the basis that its terms were used in their ordinary signification. If there was any ambiguity in the question so that its language was capable of being construed in an ordinary, as well as in a technical sense, the defendant can take no advantage from such ambiguity," and there being evidence that the affection was subacute rheumatism, which some physicians testified was generally over-looked as a disease, a verdict in favor of the insured was sustained.[1]

Where the insured, after being asked as to certain specific diseases, was asked if he had "had any sickness within the last ten years," and answered "pneumonia in 1862," it was claimed that he should have gone further, and disclosed the fact that he had had chronic pharyngitis some years previously to the application, but the court say,[2] "There is evidence in the record to show that pharyngitis is an inflammation of the throat and, when slight, not to be called a sickness, and not likely to shorten life. If the policy in this case is to be avoided by the fact of Mr. Wise having had this affliction in 1860, or 1861, and by his not having disclosed that fact in his answer, then, if he had suffered from any slight indisposition or sickness within the same period, and had failed to communicate that fact in answer to the eleventh question, the policy of insurance would have been made void. His attention having been directed by the tenth question to certain diseases particularly named therein, Mr. Wise may have very naturally supposed that the eleventh question had reference to diseases or sicknesses of the same class and like importance. It will be recollected that pharyngitis is not named in either the tenth or eleventh question, and that there was proof to show that it is an affection slight in its character and effects;" and therefore the court held that it should be left to the jury to say whether

[1] Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223.
[2] Mut. Ben. L. Ins. Co. v. Wise, 34 Md. 582; s. c. 1 Ins. Law Jour. 430.

chronic pharyngitis was a "sickness" within the contemplation of the parties.

Where the insured was asked if he ever had a rupture, which he denied, the jury were instructed[1] that if they believed he "was ruptured at the time, or at any such previous period that the rupture may have been material to any question of the soundness of his health when his life was insured; or if at that time or within such prior period he wore a truss in order that it might repress hernial extrusion, the verdict should in either case be for the defendants. But though he was ruptured in 1846 and 1854, and although the rupture accidentally recurred in a worse form in 1870, from an extraordinary exertion of strength in lifting a heavy weight, yet if the jury find that from 1855 or thereabouts until after the last insurance, in 1865, he had no such disease, and was all this interval in the habit of working and using bodily exercise, and occasionally dancing, bathing, and traveling, and could walk long distances without being fatigued, and either did not wear a truss, or wore it only from continuance of early habit; that his health was not impaired or affected by the former rupture; that it would not if mentioned have increased the risk or the premium, and that there was in this respect no falsehood or wilful suppression," the court could not say that as matter of law the denial of rupture was untrue, even though the question whether he had had a rupture was followed by a question whether he was subject to certain "habitual" diseases, among which rupture was enumerated.

The questions, "Are the functions of the brain, the muscular and nervous system in a healthy state?" "Have you ever had any difficulty with your head or brain?" point to mental unsoundness, some functional or organic derangement of the head and brain, some disease or ailment affecting the brain and mental powers, material to the risk. They do not refer

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[1] France v. Ætna L. Ins. Co. U. S. Circuit, E. D. of Pa. 2 Ins. Law Jour. 657. The correctness of the instructions in this case may be doubted.

to occasional headaches, whether arising from indigestion, a derangement of the stomach or bowels, or other cause.[1] Where the deceased had once applied to an agent who referred him to a physician, and the latter refused to examine him because he knew he had syphilis, it was held a fatal concealment not to state this fact on a subsequent application to another company, though he then submitted to an examination, saying that the story had got about that he had had syphilis, and he wanted to be examined to show that he had not.[2]

In Tidswell v. Ankerstein,[3] it appeared that the insured was in a dying condition when the policy was issued, and a verdict was rendered for the insurer. In Lefavour v. Insurance Company,[4] it is said that the fact that the insured was dead at the time the policy was issued, was a material fact to be disclosed.[5] In the same case it was held that whether

[1] Higbie v. Guardian Mut. L. Ins. Co. 53 N. Y. 603; s. c. 2 Ins. Law Jour. 761.

[2] Eddington v. Ætna L. Ins. Co. Supreme Ct of N. Y. MSS.

[3] Peake, 151.

[4] 1 Phila. R. 558.

[5] A warranty that there is no chronic disease at the time of insurance is not shown to be untrue, by proof that, in a *post mortem* examination made four months after the insurance and fifteen hours after death, it appeared that the insured died of inflamation of the intestines and ulceration, though the physician expressed the opinion that the disorders were of long standing. He had been carefully examined, at the time of the insurance, and for several months thereafter appeared to be in perfect health. Murphy v. Mut. Ben. L. Ins. Co. 6 La. Ann. 518. In Nat. L. Ins. Co. v. Minch, 6 Lans. 100, the existence of a cancer was alleged to have been fraudulently concealed. In Schaible v. Washington L. Ins. Co. 6 Pacific Law Rep. 100, the insured died of an abscess in the lung, within ten days after the application. In Ewing v. Piedmont & Arlington Ins. Co. U. S. C. C. N. Dist. of Mo. Nov. 1873, a question as to dyspepsia was claimed to have been untruely answered. Taylor refers (Med. Jurisprud. 744) to the case of Pole v. Rogers, tried before Tindal, C. J., in February, 1840, where the question was on a policy on the life of the brother of the person insured in Rawlins v. Desborough, 1 Mood. & Rob. 238, and where the death was alleged to have been caused by hydrothorax, brought on by intemperate habits, which the company claimed were concealed from them. The evidence was conflicting, and the verdict was against the company. In this case it was claimed that the terms, "habits prejudicial to health," were so indefinite as to have little practical meaning. The same author refers to several unreported cases in which policies have been contested on the ground of misrepresentation as to health. Among them is one (p. 738) in which the insured died of strangulated hernia about thirteen months after obtaining the insurance. There was much diversity of opinion, as to whether a swelling which he had at the time of insurance, was varicocele or hernia. The jury on the first trial found that there was no fraud, but that the insured had hernia at

the pregnancy of a married woman is a fact material to be stated is a question of fact for the jury.

§ 117. **Occupation of the Insured.**—Where the occupation of the insured is asked, that must be stated in which the insured is actually engaged at the time of making the application. Thus a policy was held[1] to be avoided where a man stated he was a farmer, when, in fact, he had not for many years been a farmer, but a slave catcher, and just prior to the insurance had been in search of some fugitives, and had gone to bargain for the apprehension of others. The evidence was very strong that for some months at least previous to his death, he was habitually and very diligently occupied at this business. The court said: "If the insured, who represented himself to be a farmer, was in fact a slave-taker by occupation, and if the business of slave-taking would expose his

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the time of effecting the insurance. On a second trial the plaintiff also recovered. In Walters v. Barker (p. 746), the insurance was in May, and the death in August following. The defence was paralysis, alleged to have long existed, but the verdict was for the plaintiff. In Huntly v. St. George Insurance Company, (p. 747), a medical man insured his life and died in three months, of Bright's disease; there was also disease of the heart. In his application he had denied the existence of both of these diseases, and it was contended that, as a medical man, he must have known of their existence. In reply it was claimed that he had taken to a vegetable diet, which had been the cause of the rapid failing of his health. The verdict was for the plaintiff. In Abbott v. Howard (Hayes, 138), the insured had had a tumor, but there was a difference of opinion among physicians as to whether it was "chronic" or "critical."

Taylor quotes (p. 752), with disapproval, a case tried in 1835, where the defence was that the insured was insane at the time the insurance was effected, and the jury found that insanity had no tendency to shorten life, and therefore the concealment was not material, while Taylor says it is now admitted that insanity does tend to shorten life. The case of Mallory v. Travelers' Insurance Company (*ante*, § 73), presented a case of former insanity, not continuing at the time of the insurance, and not disclosed, and it was not considered material. In Duff v. Green, cited by Beck (Med. Jurisp. p. 696), it was held that the fact that the mother and brother of the insured had died insane, need not be stated. Chitty (Med. Jurisprud. part 1, p. 285), mentions the case of Simeon v. Bignold, where there had been the usual declaration that the insured was not affected with any disease tending to shorten life. On his death, four years afterwards, there was found to be a large fungous tumor in the kidneys, and the witnesses were of the opinion that it was an incurable organic disease of five or six years' growth. He had been treated for symptoms of the disease before the issue of his policy. The case was settled by refunding the premium. Beck states in detail (p. 709), a French case where the question involved was, whether the insured was under the influence of the disease of which he died at the time the contract was made.

[1] Hartman v. Keystone Ins. Co. 21 Penn. 466.

life to greater danger than farming, it is not possible to escape the conclusion, that the policy was thereby rendered void, since, if it was wilfully made, it was a fraud, and though made ignorantly or by mistake, it was a warranty by the express terms of the policy. * * A soldier or a sailor who warrants himself a merchant, has a void policy, even though he is not slain in battle or does not perish at sea."

§ 118. In an English case, there was the usual proviso, that the policy was to be avoided by any misrepresentation or concealment; and in answer to the question as to his "name, residence, profession or occupation," the reply was, "T. P., Esquire, Saltley Hall, Warwickshire." As it appeared that the insured actually lived there, though he kept an ironmonger's shop at another place in the same county, it was held that the policy was not rendered void. Wightman, J., says: "It appears to me, that there has been a concealment, rather than a false statement by the plaintiff. The particulars required of him were his name, residence, profession and occupation. He gives his name and residence, and appends to his name the title, 'esquire.' Now it may be that he is an esquire, and it does not appear to be disputed that he is. But, then it is said that he is also an ironmonger, and ought to have so stated. The question is, however, is the statement which he did make false in fact? I cannot adopt the view that it is, or that it amounts to a statement that he has no occupation. If false in fact, it would, whether material or not, avoid the policy. * * But it is true as far as it goes. And as it has not been shewn to have been material, and as no fraud was involved in it, it is not such a concealment as can be held to be within the proviso of the policy. At most, the plaintiff has not stated all that he might have stated." The Exchequer Chamber, in affirming the decision, say that the answer is no more an untruth, than it would be if a peer of the realm, who was also a banker, did not add that fact; that all the plaintiff said was that "I am in that position of life, in which people are usually addressed as

esquires."[1] Cockburn, C. J., who dissented below, says, however, with great force: "The plaintiff was asked by this insurance company what was his profession or occupation; an inquiry which necessarily involves the preliminary question, whether he had any profession or occupation. He gives an answer, which does not directly amount to a denial, but which virtually denies that he has any occupation. He says that he is an esquire, and I am willing to take it that he is; but this appears to me to be equivalent to saying that he is an esquire and nothing else; that is, that he has no occupation. Suppose he had been asked, 'Are you in trade?' and had replied, 'I am an esquire,' he would have conveyed the impression that he was not in trade. And such, I think, is his answer to the question actually put to him."[2]

§ 119. In an unreported case,[3] the Superior Court of the City of Buffalo, held a policy forfeited, where in the application, the statements in which were made warranties, it was stated that the assured was the wife of the insured, and the jury found that such was not the fact.[4] It has already been noticed that a false statement as to the relation the assured bore to the business in which he was engaged, has been held to avoid the policy.[5]

§ 120. A statement of present occupation in the application, is not a warranty against a change of occupation;[6] and where the policy requires notice to be given of any change, a

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[1] Perrins v. Mar. & Gen. Trav. Ins. Co. 2 E. & E. 317; s. c. 6 Jur. N. S. 69, 627; 29 L. J. Q. B. 17, 242; 8 W. R. 563; 1 L. T. N. S. 27.

[2] In South. L. Ass. Co. v. Brooker, MSS. Supreme Ct. of Tenn., the occupation was stated as steamboat agent and merchant. No proof was given that he was a merchant, and the fact was held immaterial. See Cazenove v. Brit. Eq. Ass. Co. *ante*, § 112.

[3] Stanard v. Am. Pop. L. Ins. Co. Dec. 1870.

[4] On the same point, see Holabird v. Atlantic Mut. L. Ins. Co. 2 Dillon, 166, *in notis*; s. c. 2 Ins. Law Jour. 588; Equitable L. Ass. Co. v. Paterson, 41 Geo. 338; *ante*, § 25.

[5] *Ante*, §§ 48, 50; Valton v. Nat. Fund L. Ass. Co. 20 N. Y. 32; s. c. 1 Keyes, 21. As to what is being or having been in the military service, see *post*, Chapter on the Effect of War.

[6] Prov. L. Ins. & Inv. Co. v. Martin, 32 Md. 310; Prov. L. Ins. Co. v. Fennell, 49 Ill. 180.

single instance of employment in any new business need not be reported.[1]

§ 121. **Age of the Insured.**—A misrepresentation as to age, though unintentional, forfeits the policy, if there is a warranty as to age.[2] It does not, perhaps, directly concern the health of the insured, but it materially affects the probabilities as to the duration of life, and therefore the amount of premium to be paid. In a recent case[3] there were two distinct questions in the application: "1. Place and date of birth of the party whose life is to be insured. 2. Age next birthday." The court, in charging the jury, say: "A good deal has been said about the uncertainty this man was under as to his age. I cannot say that was any reason he should be careless in describing his age, but, on the contrary, he ought to have been the more careful. I agree that if he had described his age as uncertain, the defendants must have abided by the contract as made. But this is not the contract; he is not described as a person of uncertain age. As to the insurance of July his answer to question five is simply "Thirty years," and his answer to question four, "Born in 1835, Gloucester County, New Jersey," and there is interlined between "1835" and "Gloucester County, New Jersey," the words "October 28th." Mr. Scott, the agent who took the application, has explained how that occurred. He says Chew said it was as near as he could recollect, and although he states there was no doubt at all about the year, he says there was a difficulty in determining the day of the month. Now, though this application does not contain the words "as near as I can recollect," I think, under the circumstances of the case, you are at liberty to read it as if they were there. I don't think it makes any material difference whether they are there or not. As to the second application, the one in September, the answer to question four is,

[1] N. Am. L. & Acc. Ins Co. v. Burroughs, 69 Penn. 43; s. c. 2 Ins. Law Jour.

[2] Murphy v. Harris, Batty (Ir.) 206.

[3] France v. Ætna L. Ins. Co. U. S. Circuit E. D. of Pa. 2 Ins. Law Jour. 657; s. c. 3 Pittsburg Leg. Jour 170.

"Born New Jersey, 1835." The fifth question is, "What is your age next birthday?" and the answer, "Thirty years October 28th, as near as I can recollect." That certainly does not mean to apply to the thirty years; it means, according to fair reading, that he was born in 1835. It was the 28th October as near as he can recollect. He signs at the foot of this application, "That is as near as I can remember," applying to all the preceding questions. It is not a question of words, but of fair meaning. If the man was a few months or even perhaps a year or two older than he states, it might not materially affect the risk; and even without the words "as near as I can recollect," or "remember," if the difference was a slight discrepancy, such as would not affect the risk, I should not think it a material difference, and certainly not when these words are contained in the application. But these words have not any indefinite meaning; they don't mean, I am a person of uncertain age, but am a person of the age of thirty years or thereabouts, which in law means not materially different from that age. * * * I do not see how you can decide this case upon the evidence, disregarding the fact that Chew was at least 35 or 37 years of age. If so, the risk was materially misdescribed in these policies, and the plaintiffs cannot recover."

Where the agent of the insurers, at the time of effecting the policy, expressed himself satisfied as to the age of the insured, it was held that this did not dispense with the necessity of proving the age as stated in the warranty.[1]

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[1] Westropp v. Bruce, Batty, 155; Murphy v. Harris, Batty, 206. Sweeny v. Promoter L. Ass. & Ann. Co. 14 Irish Law, N. S. 476, involved a question as to age. In Wray v. Manchester Provident Assurance Company (*London Times*, March 31, 1871), the action was on a policy effected in October, 1869, upon the life of Margaret Ann Tearse. The application stated her age to be sixty-nine years, and there was a proviso that if any statement was untrue, the policy was to be void. A certificate of baptism in 1796. of Margaret Ann Surtees, daughter of John Surtees, and a marriage certificate of William Tase and Margaret Ann Surtees, in 1814, were given in evidence, so that if she was only sixty-nine when the policy was obtained, she must have been married at the age of eleven. Members of the family proved that William Tase was the same as William Tearse. Though the identity was disputed, the jury found in favor of the company. As to the practice of the English Companies in cases where the age has been understated, see Chapter on the Policy.

§ 122. **Residence of the Insured.**—In a case already referred to,[1] it was claimed that there was a materially false representation as to the residence of the insured. She was correctly described as a resident of a certain place, but no mention was made of the fact that she was a prisoner in the county jail at such place. The policy was to be valid only if the statement made was free from all misrepresentation and reservation. It was held that though there was nothing express which required the imprisonment to be stated, and no omission of any matter which the office called for, yet if it were a material fact, the keeping it back would be fatal, and it was therefore for the jury to say whether it was material. In an accident policy a misstatement as to residence has been held immaterial.[2]

§ 123. **Habits of the Insured.**—If there is a stipulation that the habits are sober and temperate, it is sufficient, to avoid the policy, for the defendants to show that the habits were intemperate; and it is no answer to this plea to prove the intemperance not to have been such as to have injured the health of the insured, or to shorten his life.[3] Coleridge, J., says: "It is said by the plaintiff's counsel that the question is, whether the deceased was intemperate to such a degree as to injure his health. I differ from that position; for the society has a right, from many motives of their own, to act upon what rules they please, and to stipulate, as in this case, that, even though a man's health be not impaired, every person whose life is insured at their office shall be a person of temperate habits. * * You ought to say, upon the weight of this evidence, whether the man, Stoneman,

[1] Huguenin v. Rayley, 6 Taunt. 186; *ante*, § 68. In Southern Life Ins. Co. v. Booker, MSS. Supreme Ct. of Tenn., the residence was stated to be in New Orleans, whereas he resided in an adjoining place and did business in New Orleans. The error was held immaterial. In the same case there was an apparently clerical error as to birthplace.

[2] Tooley v. Hartford Pass. Ass. Co. 2 Ins. Law Jour. 275.

[3] Southcombe v. Merriman, 1 Car. & Marsh. 286; and as to this case see Taylor's Med. Jur. p. 741, Phila. ed. of 1866; also, as to intemperance, see Hutton v. Waterloo L. Ass. Soc. 1 F. & F. 735; Wheelton v. Hardisty, 8 E. & B. 232; Taylor's Med. Jur. 742; Chattock v. Shaw, 1 M. & Rob. 498; Aveson v. Kinnaird, 6 Ea

were of sober and temperate habits at the time of the insurance." The words of the questions in the ordinary application upon this subject are to be understood in their ordinary, every-day sense, as they are not words of art.[1] The questions whether the applicant ever habitually used ardent spirits to the extent of intemperance,[2] or whether he had ever been addicted to the excessive or intemperate use of alcoholic stimulants,[3] do not mean that he has never habitually used spirits, or never been addicted to the use of them, but that he had not habitually used or been addicted to them to the extent named. Nor does a warranty that his habits were uniformly and strictly sober and temperate and that he did not habitually use intoxicating drinks as a beverage mean that he does not use intoxicating liquors at all.[4] But a representation that the insured is temperate as to the use of intoxicating liquors and has always been so, is falsified if he was addicted to periodical and habitual "spreeing." [5]

§ 124. Bunyon says, that intemperance, apart from the declaration, is a material fact, and concealment of it vitiates the policy, and it is scarcely impossible to imagine intemperance not injurious to health.[6]

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[1] Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415; Mowry v. Home L. Ins. Co. 9 R. I. 346.

[2] Ewing v. Piedmont & Arlington Ins. Co. U. S. C. C. North. Dist. of Mo.

[3] Swick v. Home L. Ins. Co. *ubi supra.*

[4] *Ibid.* In the latter case the court say: "If the company did not intend to insure any person who used intoxicating liquors at all, it would be very easy to ask such a question. But they have not done so. The occasional use of intoxicating liquors by the applicant would not make these answers untrue; nor would they be rendered untrue by any use of intoxicating drinks which did not make his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to a habitual use of such drinks as a beverage." And it is the province of the jury to decide from the evidence whether the assured was or was not, at the time the application was made, a man whose habits were uniformly and strictly sober and temperate, or whether he did or did not habitually use intoxicating stimulants as a beverage.

[5] Mut. Ben. L. Ins. Co. v. Holterhoff, 2 Cincin. 379.

[6] P. 45. Cited with approval in Mut. Ben. L. Ins. Co. v Holterhoff, 2 Cincin. 379, 384.

The case of Rawlins v. Desborough, reported 2 Mood. & Rob. 328, on other points, as stated in Taylor's Medical Jurisprudence, shows a singular state of facts. One of the plaintiff's witnesses swore that the deceased "never appeared to me to take anything to

The case of Pole v. Rogers, already referred to, is said by Taylor[1] to have involved the question, whether the immediate or the remote effects produced on the body by intemperance are to be regarded. It was contended that it might be that the effect of a habit of drinking might be counteracted by other habits, but Taylor says the real question is: "Can any person indulge in an excessive use of alcoholic liquids without this practice, sooner or later, leading to an impairment of health, by producing disorder of the stomach and liver, and remotely affecting different organs? The effects of such habits may not show themselves immediately, but the office requires to be informed of their existence or non-existence, and not of the period when they are likely to affect health visibly or to engender a fatal disease. To assert that a man can be addicted to excessive drinking without impairing his health, is contrary to all experience. * * Habits may accustom a man to intemperance; it may enable him to drink a large quantity of alcoholic liquid without being apparently injuriously influenced by it at a time; but a deranged state of the system will, sooner or later, follow, and delirium tremens or dropsy will probably supervene."

Taylor refers[2] to the case of Craig v. Fenn, where no answer was given to the question, whether the insured was of

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hurt a man; I only saw him intoxicated fifty or sixty times in four years;" while his groom swore he had seen him "tipsy a hundred times, perhaps, but not beastly drunk;" and a medical man swore that he had advised another office not to insure him, as he had the delirium tremens. Yet, there was a verdict for the plaintiff.

In Sceales v. Scanlan, 5 Irish Law, 139; s. c. 6 *Ib.* 367, the warranty was that the insured was strictly temperate. The court say, "What was meant by the words 'strictly temperate habits,' must depend on the circumstances of each case, as habits that might be considered temperate in one man might not be considered so in another; that is, that the meaning of the words 'strictly temperate' was a question of construction for the jury," and they "must consider whether, in their opinion, having regard to the condition of life, age, and sex of the deceased, he was or was not a person they would regard as a man of strictly temperate habits." *Sed quære.*

As to intemperance see Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins. Law Jour. 25, fully stated, *ante*, § 78.

[1] Med. Jurisprud. p. 744. Reported upon another point, 3 Bing. N. C. 780, and 4 Scott, 479.

[2] P. 742. Reported on another point, 1 Car. & M. 43.

temperate and moderate habits, and in consequence of this the company charged a higher rate of premium than usual, but they nevertheless had a verdict in their favor, on the ground of concealment. But where there was a warranty that the assured had never been addicted to the excessive or intemperate use of liquors, it was held, that a plea that he died from the effects of such liquors must be struck out,[1] as the warranty was affirmative, not promissory, and related only to the time it was made, not to his habits after the issue of the policy.

A habit of opium eating, if not disclosed, would undoubtedly vitiate the policy. An objection, founded on this habit, was raised in a Scotch case, but the defence was not sustained.[2] Taylor,[3] while saying that inveterate smokers are liable to attacks of dyspepsia, loss of muscular and nervous power, weakness, and other derangements of the system, admits that there is no evidence to show that the practice has a tendency to shorten life, but nevertheless thinks that the habit, if inveterate, should be stated in the application.

Ellis states[4] that, in the unreported case of Edwards v. Borrow, the fact that a single woman had had a child, two or three years before the insurance upon her life was effected, was held to be a material fact, which the assured ought not to conceal, but he observes: "If the nonsuit had proceeded upon the fact of the birth of the child alone it certainly would appear extraordinary, because it is understood that the offices make no difference in premium between a married and a single woman. It is difficult to see how such a circumstance, which had happened two or three years previously, could be material, unless it be taken as affording a ground of probability that the female to whom it occurred might gradually degenerate into an immoral course which may tend to

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[1] Horton v. Equitable L. Ass. Co. N. Y. Common Pleas; 2 Bigelow Life & Acc. Cos. 108.

[2] Forbes v. Edinburgh L. Ass. Co. 10 Ct. of Sess. Cas. 451; s. c. 7 Fac. Col. 351. Taylor Med. Jur. 747, apparently refers to this case and states the evidence fully. He shows there was a question raised as to the effect of opium eating.

[3] Med. Jur. 751.

[4] Insurance, 123.

shorten life. It, however, afterwards appeared that the child was born under circumstances of extraordinary disease and moral turpitude on the part of the parents."

§ 125. **Medical Attendant of the Insured.**—Where there is a question as to the medical attendant, the question must be fully answered. If the name of the last medical attendant is asked, the name of the last person who attended the insured medically must be given, even though that person was not a regularly educated physician. If the inquiry is, as to the usual medical attendant, his name should be given, and if the usual attendant was not the last one, that fact should be mentioned, even where the inquiry is not, as it frequently is, for the last and usual medical attendant. In Huckman v. Fernie,[1] a wife whose life was insured by her husband, had, previously to her marriage, been attended by a Mr. Duck, a medical man, once in 1829, and again in 1830, for a serious illness. After her marriage, in 1832, Mr. Day, being in attendance on the family of the husband, on one or two occasions prescribed something for a cold under which she was suffering, but the trouble was so slight that he made no charge. The applicant having stated that Mr. Day was the usual medical attendant, the court set aside a verdict rendered for the plaintiff. Lord Abinger says: "He sends his wife to answer printed questions, and she is asked a question, 'Who is your usual medical attendant?' * * Suppose a person goes to effect a policy on his life, who had no medical attendant in the last year; if the answer to the question were, 'I have no such medical attendant,' must not that question, of necessity, be followed by another question, which is, 'Who was your former medical attendant?' The terms and nature of the question prove that it was designed to extract from the person, who is the medical attendant best able to give an account of her constitution at that time; and if she has no usual medical attendant in the precise grammatical sense of the question, it appears to me that she is bound to mention

[1] M. & W. 505; s. c. 2 Jur. 444.

who is the medical attendant who could give that information. * * The word 'usual' implies having attended more than once, but he (Mr. Day), had never attended her more than once or twice, and he could or would not even swear to twice; but Mr. Duck had attended her in a serious illness, and had visited her for several years; and, although he, it was said, had retired from business, he was not withdrawn from the opportunity and the means of an inquiry being made of him, if she had referred to him. It appears to us, therefore, that the Chief Justice would have done right if he had laid it down to the jury, that if she, in answering that question, was aware that the person, whose name she gave, could not be the proper person to render the account that the defendant wished to have of her, it was her duty to have mentioned the circumstance, and to have stated, that, although Mr. Day was a person whom they might send to, he was not the usual attendant, but that the usual attendant had been Mr. Duck. Let us illustrate it thus: Suppose Mr. Day had never attended her at all, but that, when she married, she had ceased to have any medical attendance, what answer ought she to have given? Suppose she answered, 'I have no usual medical attendant;' that answer would have been followed up by this question: 'But had you ever any usual medical attendant.' She must have known that the question was intended to elicit from her an answer, designating the person who could give the best information of the state of her constitution at that time. It appears to me, and the court are of that opinion, that the Chief Justice should have left it to the jury to say whether, under these circumstances, Mr. Day could properly be called her medical attendant at all; and if he could not, then, as a necessary consequence, the jury have found a wrong verdict. * * She must have known that the answer was intended to deceive, more especially when it is considered that, on one or two former occasions, Mr. Duck's answers had prevented her effecting any policy at all."

§ 126. In another case,[1] a female, was represented to the

[1] Morrison v. Muspratt, 4 Bing., 60.

insurers in December, 1822, by a medical man, as enjoying ordinarily a good state of health. The same representation was repeated by him in March, and the insurance was effected in April, 1823. Between December, 1822, and March, 1823, she had been ill with a pulmonary attack, and was attended by another physician, but no disclosure of these circumstances was made to the insurers. In April, 1824, she died of pulmonary disease. It was held that the jury ought to have been called on to consider whether the illness in 1823, and the attendance of the second medical man, ought to have been disclosed to the insurers, and that it was not sufficient to direct them generally to consider whether or not there had been any misrepresentation. The court say: "It is probable, however, it would be esteemed material, because all insurance offices are desirous to consult with the medical man who has been last in attendance on the life insured. * * If the defendants in the present case had known of the attendance of a medical man from January to March before they signed the policy, it is probable they would have paused or have altered their terms."

§ 127. In Everett v. Desborough,[1] a similar result was arrived at, but it was also held that it makes no difference whether the medical attendant is a regularly qualified physician or not. If the last or usual medical attendant be a quack, he must be referred to so long as he is the attendant. In this case, the life insured gave a false reference as to his physician. In rendering the decision, Best, C. J., says: "No longer ago than when the case of Morrison v. Muspratt was decided, this court held, that if there was reference to a man who had been the medical attendant, and no reference to the person who was the medical attendant of the life insured at the time the policy was effected, such an omission to refer to the proper person would vacate the policy. This court granted a new trial, in that

[1] 5 Bing. 503. In this case the conditions on the back of the policy were made the basis of the contract, and one of them was that there should be a reference to the usual medical attendant. Hayes, 391. See 5 Irish Law, 159.

cause, in consequence of a supposed misdirection of Lord Tenterden. Lord Tenterden afterwards, in Lindenau v. Desborough,[1] spoke in terms of approbation of the decision of this court. * * How is that case of Morrison v. Muspratt to be distinguished from the present? * * Is that a true and proper reference? Mr. Vicary, of Warminster, had never been House's medical attendant. But a medical man at Bath had attended him for some years, and could tell not only whether there was any incipient disease, but whether there were any habits which have a tendency to produce disease." Park, J., says: "The case is merely this, that Mr. House's life being the subject of insurance, the plaintiff, who was to be benefited by that insurance, refers the agent of the office to make such inquiries as he can; the agent necessarily goes to the party who was to be the life insured. * * And what does he say of himself? He is asked to refer to his usual medical attendant. He says, my usual attendant is Mr. Vicary, of Warminster. But was there a word of truth in Mr. Vicary being his usual medical attendant? Mr. Vicary was examined, and it appeared he had never been his medical attendant. No matter, then, whether Dr. Harvey were a good medical attendant or not; he was the person actually attending him, and his name was never mentioned. * * But it is said, this misstatement is not material, or not so material as the misstatement in the case of Maynard v. Rhode. I do not agree in that. It is most material that the surgeon who has been in attendance on the life insured, if such an one there be, should be referred to. If he never had had a surgeon attending him, he might have said so; but if he had one, it was material that he should be referred to."

§ 128. In Maynard v. Rhode,[2] the applicant was asked "who is your medical attendant," and he answered, "I have none, except Mr. Guy," a physician in the country, by whom

[1] 8 B. & C. 586; s. c. at *nisi prius*, 3 C. & P. 353.

[2] 1 C. & P. 360; s. c. 5 D. & R. 266.

be had been attended three years previously, though he was at that time being attended by a physician in London. Lord Tenterden left it to the jury to say whether such reference was intended to prevent a disclosure of his actual state of health, saying, "The jury must consider whether the reference to Mr. Guy, when he was daily attended by a physician and surgeon in town, was intended to prevent a disclosure of his real state of health. For, if he referred to Mr. Guy because he would speak well of his health, and thought that if he referred to the other medical men they would not so certify, though he did not die of the disease he was then afflicted with, I am clearly of opinion that the defendant is entitled to a verdict, and if the reference was made to Mr. Guy because he did not know the colonel's latter state of health, this is such a misrepresentation as will avoid the policies." [1]

§ 129. **Family Physician.**—Where the question required him to name his family physician and each one who had ever given him medical attendance, and if neither existed, some medical man, an acquaintance who knew him well, and the answer was, "Have none," it was held that the policy was forfeited by proof that he had been attended for a disease or injury of the eyes for several weeks, and had also been in an army hospital.[2] The phrase "family physician" has no technical signification.[3] "It may be sufficiently defined as signify-

[1] Taylor (Med. Jur. p. 760), mentions the case of Palmer v. Irving, where the insured stated that he never had a medical attendant. His life was insured for a large sum, on November 21, 1842, and he died on December 5, following. There was reason to believe he had died from inflammation of the lungs; but it was proved that he had labored under symptoms of consumption, and had been attended by three medical men shortly before he effected the insurance. The policy was held void.

[2] Fitch v. Am. Pop. L. Ins. Co. 2 N. Y. Supreme R. 247.

[3] Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223. One of the judges in a dissenting opinion says: "I think the phrase, as used in this instance, means the physician who usually attends and is consulted by all or most of the members of the family of the person whose life is assured, and that the person thus assured, if he has medical attendance, must be one of the members attended by such physician."

In Forbes v. Edinburgh L. Ass. Co. 10 Ct. of Sess. Cas. 451; s. c. 7 Fac. Col. 351, it was stated by the Lord President (though the decision of the case did not turn upon that ground), that, where the insured referred to a medical man who had in fact never attended him, and the latter on application so stated to the company before the policy was issued, it was a fraud not to mention the name of another medical man who had in fact attended him. In Abbott v. Howard, Hayes, 381, it appeared that the gentleman

ing the physician who usually attends and is consulted by the members of a family in the capacity of a physician." It is not necessary that he should invariably attend and be consulted by the members of a family, or that he should attend and be consulted by all the members of a family. Thus where a man's family consists of himself, a wife and children, the person who usually attended and was consulted by the wife and children, would be the family physician, though he did not usually attend on and was not usually consulted by the insured.

§ 130. **Presumption as to who is Medical Attendant.**—In one case[1] it is held that a person who has once been the

who was really the last medical attendant, was applied to, and he gave a certificate which was not used, but another physician who had previously attended him was referred to, and he did not mention the fact that the insured had had a tumor, as to the character of which, as affecting the life permanently, the physicians disagreed. The withholding of these facts was regarded by the court as fraudulent.

In Sceales v. Scanlan, 5 Irish Law, 139; s. c. 6 Irish Law, 367, one of the breaches of warranty alleged was in a statement that the insured had had no medical attendant except a person named. In Hutton v. Waterloo Life Ass. Soc. 1 F. & F. 735, the questions put by the company sought information as to whether the insured was sober and temperate, and he was asked if he was aware of any disease or circumstance tending to shorten life, or whether there was any other fact with which the company ought to be made acquainted. The answers were in the affirmative as to the first question, and in the negative as to others. He was asked also for the name and address of his ordinary medical attendant. It appeared on the trial that the insured in the year of the issue of the policy, and in the preceding year had been attended for the effects of severe drinking, and, on the last occasion (a month or two before the policy was issued), for *delirium tremens*, of another attack of which disease he died two years later. The medical man, who attended him for several years before the issue of the policy, and down to his death, was not mentioned as the ordinary medical attendant. On this state of facts, it was held a verdict for the company was justified, though the answer as to the medical attendant was *bona fide*.

In Horn v. Amicable Life Insurance Compan y, 64 Barb. 82, the insured was asked to name "the physician usually employed by him, and, if he had none, then to name any other doctor who could be applied to for information, upon the state of his health." His answer was, "None." The fact was that he had occasionally applied to one physician for remedies for a severe cough of long standing, shortness of breath, and profuse expectoration, during six or seven years, between 1861 and 1868, and within days he had been examined by the physician of another company, who had rejected him. This was held to be "clearly a fraudulent concealment." In Smith v. Ætna L. Ins. Co. 49 N. Y. 211; s. c. 2 Ins. Law Jour. 116, the answer to the usual question was "had no physician." In Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223, the answer to the question, as to the "name and residence of the family physician, of the party or of one whom the party has usually employed or consulted," was "Have none." This was held to be a positive denial, that the life insured had a family physician.

[1] Monk v. Union Mut. L. Ins. Co. 6 Robert. 455. The case was appealed to the Court

medical attendant, is presumed to continue so, unless there is proof of the termination of that relation. In the application for a policy issued in September, 1866, the insured stated that he had no usual medical attendant. In an action upon the policy, it appeared that Dr. Burdick first knew the insured in 1861, and during part of the time prior to the death of the insured, in 1867, he was the family physician; that he first prescribed for him in 1863, and during the same year prescribed four times for his family; that he prescribed for the family in 1864, and that in 1866, he twice attended the insured, once for five days, the last time being a month before the policy was issued; and he also prescribed for him in November subsequently. There was no evidence that any other physician ever attended the insured, prior to the issue of the policy, or that he was ever indisposed at any other time, but there was evidence that after his sickness, in in August, 1866, he said he was going to change from homœopathic to allopathic treatment, and Dr. Stirling was in point of fact called in, in November, but Dr. Burdick attended him in his last illness, in February, following. Upon this evidence, the court directed the jury to find a verdict, that the answer as to the medical attendant was not correct, and that the company was not liable. The plaintiff claimed that it should have been left to the jury to pass upon the question of the truth or falsity of the answers, but the court held that Dr. Burdick was admitted to have been the physician of the insured at one time, that there was no evidence of discharge, and that as the usual employment of a physician is continuous in its nature, evidence of a discharge was necessary.

§ 131. Where the insured was asked, among other things, how often had medical attendance been required, and he answered, "One year ago," it was held that he must be taken to say, "Once, one year ago," and the court say,[1] "The an-

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of Appeals, but compromised before argument there. It was doubtless properly decided, but the soundness of the reasoning may be doubted.

[1] Cazenove v. Brit. Eq. Ass. Soc. 29 L. J. C. P. 160; s. c. 6 Jur. N. S. 826; 8 W. R.

swers indeed may be said to be true in one sense, for so much as is stated in them is not false, but it is nevertheless an untrue statement. It is just as untrue as when a person is asked how old he is, and he states in answer a number of years less than his true age. It is trifling to say that that is a true answer, which requires something to be added to it to make it true." The question who was the usual medical attendant upon the applicant for life insurance, is a question of fact for the jury.[1]

§ 132. **Other Insurance.**—As to the existence of, or the application for, any other insurance upon the same life, Lord St. Leonard says, in Anderson v. Fitzgerald,[2] "What could have been more material than the question, 'Has your life been refused by any other office?'" It may be important for the company to know how much insurance has been obtained, as some security against positive fraud. In the case just referred to, the question put was, "Has the party's life been accepted or refused in any other office, and, if accepted, was it at the usual premium or with what addition?" The answer was "No," and the Lord Chancellor says, "That meant that an insurance on his life had not been accepted or refused at any other office."

Where the applicant stated that he had been proposed at another office, and accepted at the ordinary rates, and it appeared that he had been declined at one office, and at another he had been examined and approved by the medical examiner, but nothing further had been done, it was held that the answer was untrue, or, at least, a suppression of a material fact, but was not designedly so.[3] In another case,[4] in which there was a warranty of the truth of the representations, and it was stipulated that if there was any fraudu-

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243. See also Brit. Eq. Ins. Co. v. Great West. R. R. Co. 38 L. J. Ch. 132; *ante*, § 95, and Palmer v. Harris. cited, Ellis on Ins. 131.

[1] Scoles v. Univ. L. Ins. Co. 42 Cal. 523.

[2] 4 H. of Lds. Cas. 484; s. c. 17 Jur. 995; 24 Eng. Law & Eq. 1.

[3] Fowkes v. Manch. & Lond. L. Ins. Co. 3 F. & F. 440. The plaintiff, however, had judgment because it was held that, under the language of the policy, a misstatement must be wilful to produce a forfeiture.

[4] Bennett v. Anderson, 1 Irish Jurist, 245.

lent concealment, the policy should be void, in answer to the usual question, "Has the party's life been accepted, or refused, at any other office; and if accepted, was it at the usual premium, or with what addition," it was stated "Asylum and National office, at the usual premium." On the trial it appeared that the party's life had been proposed at two other offices and rejected, and the judge having left it to the jury to say whether there was any concealment of any material fact, this was held to be an error, for the assured had agreed to answer truly, and the question whether an answer given was more or less material was not open to him.

Where the application was to insure an invalid life, the office wrote asking if the life had been refused by any office, and if so to name it. There had been numerous refusals, and negotiations with other offices were pending, which afterwards resulted in refusals. The reply was, that he had been and still was corresponding with other offices, as the amount to be insured was large. This was held to be such an intentional suppression of the facts as to vitiate the contract. The Vice Chancellor said that it was most material to bear in mind that, on the 23d November, 1865, he had applied to eight offices without success. He thought the terms of the letter of application were sufficient to put the office on its guard. It told them that it was an invalid life, but did not tell them of the refusals. He did not think this court would oblige a person to say without being questioned, by what offices he had been refused. When told that the life had been accepted at an increased rate, that still carried on the inquiry which had been started when they were told it was an invalid life. The question put by the office, whether he had been refused by any other office, and if so, to name it, was the important point on which the whole argument turned. If he knew he had already been refused by eight other offices, what justification had he for the answer he gave? Did it not imply that he had not been refused? In order to tell a falsehood it was not always necessary to use express words, it might be done by implication. He must assume that even had he

named only one office by whom the life had been refused, this office would have inquired the cause of such refusal. This showed the necessity for fair and open dealing. Did not this gentleman's answer mean that he had not been refused, but was still in correspondence, as the amount was large. On what principle could he have sent such an answer? For some time he had been rather impressed with the idea that there was enough here to put the office on its guard. He now thought this had been written to avoid the truth. He was bound to conclude, though with some reluctance, that there was here suppression, and intentional suppression, of facts, which, if known to the office, would have prevented their granting the policy. The suppression vitiated the contract.[1]

§ 133. In a case in Maryland[2] the court say: "It appears from the evidence in the cause that the deceased had been applied to by the agent of another insurance company, and, at his solicitation, underwent an examination by the physician, who declined reporting favorably on his case because his pulse was two or three beats higher than his company would take, and who said he could not recommend the life, and suggested that the papers be not sent on to his company * * and that he should not be required to pass an opinion on the life, as it might injure Mr. Nesbitt if he applied to another company. The application had been filled up, and was ready to be sent on, but the opinion of the physician prevented it. * * The fourteenth interrogatory, propounded to Nesbitt, was in these words: 'Has a proposal been made for insuring the life of said party (Nesbitt) at any other office? and if so, state whether it was accepted or declined?' To this question Nesbitt answered, 'No.'" On appeal the court held[3] that the company had no cause of complaint, the truth or falsity of the answer hav-

[1] Re Gen. Provincial L. Ass Co. 18 W. R. 396.

[2] N. Y. L. Ins. Co. v. Flack, 3 Md. 341.

[3] In Wainewright v. Bland, 1 Mood. & Rob. 481, 498; s. c. 1 Tyrwh. & Gr. 417; 1 M. & W. 32, the jury found a misstatement as to the amount of other insurance. See also Fowkes v. Manch. & Lond. L. Ins. Co. 3 F. & F. 440; cited *ante*, § 108. The recent

ing been submitted to the jury by an instruction that, if they should find the declaration in any material respect untrue, or if they should find he had made a prior proposal to another company, that there could be no recovery."

In Mutual Benefit Life Insurance Co. v. Wise[1] the answer to the question whether any other company had declined to insure his life was in the negative. At the trial it appeared that he had made application to the agent of another company, that it had been forwarded to the chief office and returned, with a memorandum which indicated that it might be reconsidered. The agent had advised the applicant to withdraw his application because of a rule of his company as to the proper relation between height and weight, and the insured, who did not know that his application had gone forward, assented to the withdrawal. It was held that it was for the jury to say whether the first company had declined to insure, and that the failure to state what had occurred was not a concealment. A representation that other insurers had effected a policy upon the risk, and on the terms proposed, if untrue, forfeits the policy.[2] So, procuring an underwriter to make a colorable insurance as an inducement to others to insure the same life, is a fraud which renders the contract void.[3]

case of Brennan v. Security L. Ins. & Ann. Co. 4 Daly, 296, also involved a misstatement as to the amount of existing insurance.

[1] 34 Md. 582; s. c. 1 Ins. Law Jour. 430.

[2] Sibbald v. Hill, 2 Dow. Parl. R. 263; the case is not one of life insurance, but it is cited with approval in Valton v. Nat. Loan Fund L. Ass. Soc. 20 N. Y. 32, and by Bunyon, p. 55.

[3] Wittingham v. Thornburgh, 2 Vern. 206; s. c. Prec. in Ch. 20.

CHAPTER V.

THE CONSUMMATION, DURATION, AND TERMINATION OF THE CONTRACT OF LIFE INSURANCE.

§ 134. **Commencement of the Risk.**—It being clear that the insurer is not liable, unless the death occurs during the continuance of the insurance, it is essential to determine when and how a risk may commence, and when and how it terminates. A risk of course commences from the moment the company and the assured agree that it shall commence, but it is not always easy to determine when that moment is. In a recent case[1] the court lay down some of the principles governing such cases, and indicate one way in which difficulties may arise. "The transaction, as it appears in evidence, and in evidence under the plaintiff's own handwriting, is this: there being a stipulation or proposal for a policy upon the life of the gentleman in question, it was agreed between Cook, as agent for the company, and the plaintiff, that there should be a waiver of some of the ordinary conditions of a policy. * * That agreement was made in plain and distinct terms. But the proposal, under the plaintiff's own handwriting, was by mistake made in different terms. I think to that extent there is evidence to shew that there was a mistake in what was written by the hand of that plaintiff himself. * * Now, that was a mistake to which, unfortunately, the plaintiff himself was a party, by being the person who, in fact, committed it himself. I do not say, however, that that would deprive the plaintiff of the benefit of the doctrine of the court, with respect to having an agreement rectified, if they could prove it so as to bind the other parties; but here it is an integral part of the case, that

[1] Fowler v. Scottish Eq. L. Ins. Soc. 28 L. J. Ch. 225; s. c. 4 Jur. N. S. 1169.

the policy could not be received until the sanction of the society in Edinburgh was obtained. It seems to me, therefore, an irresistible conclusion, that if the directors in Edinburgh, seeing the terms communicated to them by the agent in London, had chosen to say, 'We will not agree to the terms; we object to this special waiver of the conditions, and we decline to grant the policy,' they would have had a perfect right to withhold the policy, and not to complete that which was a peculiar and extraordinary contract proposed to their agent in London, agreed to by their agent in London, and communicated by him to them; a contract that must be consummated as an agreement, by receiving the sanction of the Edinburgh body. * * The agent in London communicated this proposal, in the erroneous terms given in the handwriting of the plaintiff himself. To that proposal, which was not the real agreement, the Edinburgh directors assented, and what is sought to be reformed is the memorandum which was signed by the Edinburgh agent, and adopted by the board as that which constituted the agreement. That Edinburgh manager is now sought to be made to sign under the decree of the court, as having agreed to it, a certain stipulation of which he never heard. * * The result, upon the whole, is plain, that the agent in London agreed to something which he never communicated to his principals. The agent in London communicated that which was a mistaken proposal. The plaintiff, who made the agreement with the London agent, never intended to be bound by the stipulation which he himself framed in a mistaken form. The result is, that there is no agreement at all."

§ 135. There are three classes of cases in which the question may arise as to whether there has been a contract of insurance consummated so as to bind the company, or whether what has passed amounts only to an incomplete and inchoate agreement or negotiation for insurance, which is binding upon neither party. First: Where all that has passed between the parties rests in parol, or in a brief entry on the books of the company; Second: Where the company

has prepared a policy, but it has not actually reached the hands of the assured; Third: Where the policy has come into the hands of the assured. The principles of law governing the three classes of cases are substantially the same. There must in all be a meeting of the minds of the parties, as to the subject of the insurance, as to the risk, the amount insured, the time the risk shall commence and continue, and the amount of the premium;[1] but the evidence of an intention to treat the contract as concluded and binding, will be more or less conclusive according as one or all of these facts are proved.

§ 136. **Verbal Contract Sufficient.**—The cases in which no policy or written contract has been prepared or delivered, present the most difficulty. The general rule is, that a verbal contract for insurance is, in the absence of an express statutory provision to the contrary, as binding as a written one, and that such a contract is not within the statute of frauds,[2] though a doubt was at one time intimated in New York,[3] and it has apparently been held in Ohio,[4] that a writing is necessary. The English "Gambling Act," by requiring the person interested to be named in the policy, seems to imply a written policy.

§ 137. **Corporate Power of Company.**—In considering the question whether there is a completed contract of insurance, there is necessarily involved the question whether the con-

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[1] Trustees of First Baptist Church v. Brooklyn F. Ins. Co. 28 N. Y. 153; Tyler v. New Amsterdam F. Ins. Co. 4 Robert. 151.

[2] Trustees of First Baptist Church v. Brooklyn F. Ins. Co. 19 N. Y. 305; Audubon v. Excelsior (F.) Ins. Co. 27 N. Y. 216; Union Mut. Ins. Co. v. Com. Mut. M. Ins. Co. 2 Curt. C. C. 524; s. c. 19 How. U. S. 318; Kelly v. Com. Ins. Co. 10 Bosw. 83; Walker v. Met. (F.) Ins. Co. 56 Me. 371; Post v. Ætna (F.) Ins. Co. 43 Barb. 351, 362; Hamilton v. Lycoming (F.) Ins. Co. 5 Barr. 339; Sanborn v. Fireman's Ins. Co. 16 Gray, 448; Mobile (F.) Ins. Co. v. McMillan, 31 Ala. 711; Smith v. Odlin, 4 Yeates, 468; Belleville Mut. (F.) Ins. Co. v. Van Winkle, 1 Beasley, 333; Security F. Ins. Co. v. Kentucky M. & F. Ins. Co. 7 Bush, 81; Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; Rhodes v. Railway Pass. Ins. Co. 5 Lans. 71; Ellis v. Albany City F. Ins. Co. 50 N. Y. 402; Fish v. Cottenet, 44 N. Y. 538.

[3] Sandford v. Trust F. Ins. Co. 11 Paige, 547. The French Code requires a written contract; Com. Co. B. 2, Art. 332.

[4] Cockerill v. Cincinnati (F.) Ins. Co. 16 Ohio, 148.

tract alleged to have been made, is one which the company on its part had the corporate power to make, and also whether the particular person or persons, alleged to have acted in behalf of the company, were authorized to act, and to act in the manner alleged. The question of the power of agents will be considered hereafter, in the chapter devoted to that subject, while the question of corporate power, is one which could only be fully considered in a treatise upon the general powers of corporations. It may be said broadly that a contract of life insurance will be sustained by the courts, unless it is made affirmatively to appear, that it was clearly beyond the corporate powers of the company. The question that arises is, whether the company has power to contract in the precise manner the contract is alleged to have been made; and this question becomes really of little importance in insurance, because if it is held that the written contract is for any cause invalid, the courts fall back upon the prior parol agreement. An express authority to the company to contract in a certain way, does not exclude the right to contract in any other way usual with a natural person. To have this effect, there must be in the charter, or other fundamental documents, express words of exclusion.

§ 138. Even in England, where corporations are held far more strictly to a compliance with their charters and rules than in this country, it is held[1] that in contracting with an insurance company, incorporated under a general act, a stranger must be taken to have read that statute and the articles of the association of the company, but nothing more, and if he knows nothing to the contrary he has a right to assume, as against the company, that all matters of internal arrangement have been duly complied with; and therefore, where a policy was issued at the office of the company, executed by the required number of persons styling themselves directors, and qualified as such, and was countersigned by a person styling himself secretary, and with the seal affixed,

[1] Re County L. Ass. Co. 5 L. R. Ch. Ap. 288; s. c. 22 L. T. N. S. 537; 39 L. J. Ch. 471.

the company was liable, though the directors legitimately appointed had refused to act, had repudiated all connection with the company, had made no appointment of new directors or of secretary, had allotted no shares, and the persons who acted were self-constituted. The real directors could have stopped the others by injunction, and, as they did not do so, it was assumed they knew the company had some office, and was carrying on some business. Gifford, L. J., says: "If we look at the policy, the policy, on the face of it, is effected in accordance with the articles. No one looking at the articles, and reading the policy, could know, or suspect, or believe otherwise than that the policy was as duly effected as any policy you might have from the Equitable, or any of the other large companies in London. I take the law, as deduced from the authorities, to be plainly this: In the first place, a stranger must be taken to have read the general act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary, he has a right to assume as against the company that all matters of internal management have been duly complied with. The company is bound by what takes place in the usual course of business with a third party where that third party deals *bona fide* with persons who may be termed *de facto* directors, and who might, so far as he could tell, have been directors *de jure*. In this case the ordinary correspondence takes place, then the applicant goes to the office and gets from the office a document which appears, on the face of it, to be executed according to the terms of the articles, and which has to it a seal which purports to be the seal of the company, that seal being put by three persons who represent themselves to be directors, and who are *de facto* directors, and countersigned by the person who was *de facto* secretary."

§ 139. In an earlier case it was held that where the registered deed of settlement, under the English law, provided, among other things, that the seal of the company should not be affixed to policies, except by the written order

of three directors, and that every policy must have the common seal and be under the hands of three directors, and a policy was issued with the seal, but without there having been any previous order of three directors, the company was liable. The company claimed that the previous order was a condition precedent, necessary to be proved to make out a *prima facie* case against it, and that without it the policy was void and incapable of being confirmed, even by the receipt of premiums for years, but the court held, that the words of the deed of settlement were directory merely.[1]

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[1] Prince of Wales L. & Ed. Ass. Co. v. Harding, 1 E. B. & E. 183. Lord Campbell, C. J., says: "It is truly said that such regulations are introduced into the deed of settlement for the protection of the shareholders. But the shareholders have reasonable protection from them, without saying that any departure from the regulations must of necessity nullify the policy; for if they are violated by the directors, the directors are answerable for the breach of them to the shareholders, and, if there has been an illegal agreement between the directors and the party effecting the policy, to the prejudice of the shareholders, the policy would be illegal. * * Whenever a party dealing with such company knowingly combines with the directors to do an act '*ultra vires*,' to the prejudice of the shareholders, as, *e. g.*, to throw upon them unlimited liability, whereas, the directors are required so to frame policies as to confine the remedy of the assured to the capital and funds in the hands of the company, the shareholders might very fairly and reasonably deny their liability on the policy. But, it would be most unjust to allow them to take advantage of an irregularity of the directors (who are denominated their agents), although they cannot show that they are in any respect prejudiced by the irregularity, and the assured cannot be charged with any fraud or impropriety. The question is, did the Legislature mean that the company may avoid all their contracts, unless the formalities prescribed by the statute and the deed of settlement, both in the form of the contract and in the process of making it, have been complied with? In support of the affirmative, it is said, that the directors are agents, with limited authority; that the contractors have notice of the limits, because the statute confers the authority subject to the provisions of the act and the deed of settlement, which is registered for public inspection; that the shareholders are the principals; and that they have an unlimited power of repudiation, although this would be an unlimited power to defraud. Conceding the impossible supposition, that every contractor has read and understood all its provisions, the statute relied upon would have effect, if these provisions were held to create a duty, *inter se* of directors and shareholders, and thus enabling the company to avoid contracts in which some of the provisions are not complied with, if the contractor with actual notice of the provisions has knowingly combined with the directors, to omit them to the prejudice of shareholders, as in the case of partnership deeds. * * This language of the Legislature creates a duty on the directors towards the shareholders, to comply with the specified formalities; but we think, it intends that the absence of the prescribed formality shall not render the contract void as against the company. * * Therefore we are of opinion that, according to the sound principles of law and the just construction of the statute, if there had been a clause in the deed of settlement, prohibiting the directors from executing any deed, unless the deed be engrossed on vellum, and an action were brought against the company, on a deed proved to be under the seal of

question is not now before the court, and hence it is not discussed or determined. In Hoffman v. Banks,[1] a similar conclusion was arrived at as to a note, and the court in like manner declined to express an opinion as to the validity of the policy. The courts seem always to have avoided deciding such policies invalid, though they have never held them valid. In some cases a decision is avoided by holding the contract to have been made in the State where the corporation is created.[2] In some of the States the policy is declared by statute to be valid, but the company is forbidden to maintain any action for the premium, or on any note given in connection with it.

§ 141. **May Contract in any Manner not Forbidden.**—In a recent case the Court of Appeals in New York say[3] as to corporate power: "The argument on behalf of the defendants is, that their charter, being the enabling act which alone authorized them to contract at all, and the tenth section having specified the mode of making contracts of insurance, all other modes and forms of making or agreeing to make insurance are necessarily excluded, and, hence, that the parol agreement alleged to have been entered into with the plaintiff was unauthorized and void. It needs no argument or authority to prove that corporations must act within the powers conferred by the organic laws under which they are created. It may also, for the present purpose, be conceded, that they can disaffirm the most solemn and meritorious engagements

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[1] 2 Ins. Law Jour. 348, Indiana.

[2] Eureka (F.) Ins. Co. v. Parks, 1 Cincin. 574; Hyde v. Goodnow, 3 Comst. 266.

[3] Trustees of First Baptist Church v. Brooklyn F. Ins. Co. 19 N. Y. 305, 309; see also Sanborn v. Firemen's Ins. Co. 16 Gray, 448, 454, and other cases there cited. N. E. F. & M. Ins. Co. v. Robinson, 25 Ind. 536; N. E. F. & M. Ins. Co. v. Schettler, 38 Ill. 166; City of Davenport v. Peoria M. & F. Ins. Co. 17 Iowa, 276; Comm. Mut. Mar. Ins. Co. v. Union Mut. Ins. Co. 19 How. U. S. 318; Walker v. Met. (F.) Ins. Co. 56 Me. 371, 377; Security F. Ins. Co. v. Ky. M. & F. Ins. Co. 7 Bush, 81. *Contra*, Mound City Mut. F. & M. Ins. Co. v. Curran, 42 Mo. 374; Spitzer v. St. Mark's (F.) Ins. Co. 6 Duer, 6. But if the charter of a mutual company requires a note to be given, the policy cannot be binding till the note is given: Belleville Mut. (F.) Ins. Co. v. Van Winkle, 1 Beasley, 333. So if the charter requires all applications to be in writing and all policies or other contracts to be signed by the president, there can be no binding parol contract. Henning v. U. S. (F.) Ins. Co. 47 Mo. 425. In a case between the same parties in U. S. Circuit Court a directly contrary opinion was given.

entered into by them in excess of those powers. These rules are not inconsistent with another, which is, that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of execution which a natural person may adopt in the exercise of similar powers. The business of insurance, for example, is not in its nature a corporate franchise. Any person may engage in it, unless forbidden by law, and his contracts of that nature, whether by parol or in writing, as we have seen, will be valid. So, when a general authority to engage in that business is given to a corporation in express terms, and there are no special restraints in its charter, it takes the power, as a natural person enjoys it, with all its incidents and accessories. It may bind itself in any mode and form of obligation which is not forbidden. If a private person can agree by parol to make insurance, so can a corporate body, unless the power of thus contracting is plainly denied to it by its organic law. That the use of the corporate seal to attest its contracts is unnecessary, has long been settled. Referring now to the charter of the defendants, we find, in the provisions above set forth, an authority to make contracts of insurance conferred in the most general terms. Unless the power thus given is specially restrained in the tenth section, it can be executed in any manner and form which the corporation may approve, and by any agents whom it may authorize to contract in its name. The power is to make 'contracts of insurance.' These may be in writing or by parol. They may be in the form of undertaking, which imports a present risk completely assumed, or they may be executory, for the delivery of a policy or a renewal of a policy at a future day. Does then the tenth section abridge the powers thus given, and confine the corporation to a particular mode of action, as well as to action through particular agents? We are clearly of opinion that it does not. This provision of the charter merely declares that the contracts of the corporation, without the corporate seal, and if signed and countersigned by the president and secretary, shall be valid and

obligatory. Now, corporations always and of necessity act by agents: and in granting their charters it is a practice eminently convenient and proper, and moreover a very usual one, to specify the mode in which, and the agent or agents by whom, their contracts may be executed so as to bind the artificial body. Such a specification forecloses all question and doubt, and relieves the parties with whom contracts are thus executed from the burden of proving that the agents with whom they deal have acted by due authority. Such specifications do not subtract anything from the general powers which corporate bodies take under their charter. Within those powers they may contract in other modes; and all the authority which they possess they may delegate to other agents. That the Legislature may restrain them in these respects is not denied; but restrictions of such a nature are founded in no policy, and they are rarely if ever imposed."

§ 142. **Intention to Make a Present Contract Necessary.**— In life insurance, as now conducted, verbal contracts for insurance can occur but rarely, and only in cases where an agreement to insure has been made by some agent authorized to make such a contract, and the policy has been ordered from the home office, but either not received or not delivered. In such a case all the elements of contract heretofore stated must be shown, and it must appear that it was the intention of both parties that the contract should be binding from that time, and before the policy was prepared. There must be something more than a mere proposal to insure. It must have been accepted by some agent authorized to bind the company, and accepted as a present contract of insurance. No case of a purely verbal contract of life insurance, where no policy has been prepared, is, we believe, found in the reports.[1] The cases upon fire insurance are, however, numerous, and the rules applicable are common to both classes of

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[1] Rhodes v. Railway Pass. Ass. Co. 5 Lans. 71, is a case of accident insurance with a parol contract.

insurance. The question is always one of fact: Did the parties agree upon a contract of insurance by which the risk was assumed from a time agreed upon.[1] In answering this question, it is a weighty consideration to know whether the premium was paid, or secured to be paid, for though it is competent to waive prepayment of the premium, there must be evidence of such waiver. In fire insurance a custom prevails in most of the principal cities of waiving prepayment of the premium, but it is believed that no such custom exists in life insurance, and therefore stronger evidence of such waiver would be required in a particular case of life insurance than in one of fire insurance.

§ 143. **Instances of Verbal Contracts.**—Where, on an application through an agent who had himself no power to bind the company, the latter fixed the amount of the premium and accepted the application, and the insured paid the premium to the agent, who gave him a receipt, it was held[2] that there was a binding contract. The insured had a reasonable time in which to accept the offer of the company as to the premium, and an acceptance the day after it came to his knowledge, was held to be in a reasonable time. It was also held that if the premium was paid to the agent before the loss occurred, it was sufficient. In a very recent case,[3] the plaintiff had applied to the agent of the defendant for an insurance on his house for three years, and the agent agreed to insure it for a certain premium, which the plaintiff paid to the agent. The agent had not the policy ready then,

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[1] In Sanborn v. Fireman's Ins. Co. 16 Gray, 448, the plaintiff's agent testified that he prepared a general application for insurance, and left it at the office of defendant's agent; that the latter's clerk subsequently came to him and said he would take two-thirds of the risk, and allow a certain commission; that the plaintiff's agent went to the defendant's agent, and the amount, rate, and time of insurance were agreed upon between them; the two agents had running accounts with each other which they settled once a month; the same afternoon the property was destroyed, and the defendant's agent at once ca led upon the plaintiff's agent and claimed that the risk was not completed. The court held that there was evidence for the jury of a contract of insurance which began immediately.

[2] Chase v. Ham. (F.) Ins. Co. 23 Barb. 527; reversed on another point, 20 N. Y. 52.

[3] Ide v. Phœnix (F.) Ins. Co. 2 Biss. 333.

but promised to give it to the plaintiff in a few hours. The policy was demanded of the agent several times, but was never delivered. During the time for which the insurance was sought to be effected, the house burned down. In an action for a recovery of the amount of the insurance, it was held that the parol contract for insurance was valid, and could be enforced without a policy; and that the failure to issue a policy by the company, after the payment of the premium, could not be taken advantage of by it in a court of equity.

§ 144. The Supreme Court of the United States has held[1] that where an application for reinsurance was made on Saturday, upon certain terms, which were declined, and other terms demanded, and on Monday these last-mentioned terms were accepted by the applicant and assented to by the president, but the policy was not made out, because Monday was a holiday, the agreement to issue the policy must be considered as legally binding, and the company liable, and that it was not essential to the existence of a binding contract that a premium note should have been actually signed and delivered. The court say: "But whether, under all the circumstances, this should be deemed to have been a continuing offer, we do not think it necessary to determine; because, on Monday, either the president's offer of Saturday was accepted by Mr. Storey, and its acceptance made known to the president, or the proposal was renewed by Mr. Storey, and accepted by the president. The fact that others chose to abstain from business on that day did not prevent these parties from contracting, if they saw fit to do so; and when one of them either accepted a continuing offer, or renewed a proposal which was accepted by the other, they made a binding contract. Nor do we think the allegation of the answer, that the president informed Mr. Storey that no business was done in the office that day, but the next day he would attend to it, can reasonably be interpreted to mean that he had not made, or intended to make,

[1] Com. Mut. Mar. Ins. Co. v. Union Mut. Ins. Co. 19 How. U. S. 318.

a contract for a policy. Their fair meaning is, that though he had agreed to make the insurance, as the secretary and clerks were not there, and the books not accessible, any action on the agreement must be deferred to the next day. The words cannot be understood to mean, that he would on the next day attend to what he had already done; and he had already made a contract for reinsurance, to be executed on the next day, by issuing a policy in due form to carry that agreement into effect. * * The respondent's counsel has argued that their president had not authority to enter into an oral contract binding the company to make insurance. They admit it has been usual for the president to make such contracts; but they say that when he has done so the policy was not issued until the next day, and no risk is understood to have commenced under such an undertaking until the policy issues. Whether a risk be commenced when the contract for insurance is made, or only when the policy issues, must depend on the terms of the contract. Where, as in the present case, there is an express contract to take the risk from a past day, there is no room for any understanding that it is not to commence until a future day. Such an understanding would be directly repugnant to the express terms of the contract. And if the defendants have held out their president as authorized to make oral contracts for insurance, no secret limitation of this authority would affect third persons, dealing with him in good faith and without notice of such limitation."

§ 145. It has been also held, that oral insurance to take effect immediately is valid, though it is made at the same time with an agreement to deliver and receive subsequently a written policy in the usual form; that it is binding until the delivery or tender of the policy; that until then the condition requiring prepayment forms no part of the contract; that the oral contract is not terminated by a demand of the premium, unless the policy is tendered, and that a recovery may be had on this oral contract, though, after the loss, and while the insurers were ignorant of it, the plaintiff paid the

premium and received a written policy, which was not binding because it was not countersigned by the proper officer of the company. The verbal contract was binding until a valid written policy was tendered, which was never done.[1]

§ 146. **Instances of Incomplete Contracts.**—But where the president of a company by parol agreed to insure, and a memorandum of the application was made in the application book, but no policy was issued, because the applicant gave notice that he wished to have the risk differently apportioned, and no premium was paid or charged, but the assured was informed that he must call at the company's office and settle or the company would not consider itself liable, it was held that there was no consummated contract.[2] So where a premium note and an application dated on that day were given to a third person to be signed, accompanied by a promise that when they were returned signed, a policy would be forwarded as of the same date, and the note was not signed for thirteen days, and was sent by mail to the company six days after the signing, during which latter period a loss occurred, it was held[3] that the contract was not complete, and the company was not liable, as the papers were at the time of the loss still in the hands of the plaintiff's agent, and therefore revocable. The postmaster was there the private agent of the applicant.

§ 147. **Agreement between Parties to same Thing Essential.**—Where a proposal for life insurance had been made and a reply given, which required the assent of the applicant to the terms given, it was held that the assent of the party himself was required, not that of his wife, nor of trustees for his creditors, nor of his creditors, he having given no authority to give such assent.[4] In this case a person subject to epileptic attacks proposed to insure his life with a company which took risks on diseased lives and had no settled rates of pre-

[1] Kelly v. Com. (M.) Ins. Co. 10 Bosw. 83.
[2] Sandford v. Trust F. Ins. Co. 11 Paige, 547.
[3] Thayer v. Middlesex Mut. F. Ins. Co. 10 Pick. 326.
[4] Rose v. Med. Inv. & Gen. L. Ins. Soc. 11 Ct. of Sess. Cas. 2d S. (Sc.) 345.

miums, but fixed the premium in each case according to its circumstance. The company transmitted to their agent a letter accepting the proposal, and stating that a policy would be issued on the payment of a premium of more than twenty per cent., but the agent, owing to an unfavorable change in the applicant's health, did not deliver the letter. It was held that as the letter contained the first specification of the terms on which the proposal would be held as accepted, no complete contract of insurance was constituted till it had been communicated to the party, and he had intimated his acceptance of the conditions it contained.[1] The proposal and assent must be to the same terms. If the assent modifies, in any particular, the terms of the proposal, there is no contract till the modification is assented to.[2] Where the agent of a mutual insurance company agreed with the assured on receiving his application, that the latter should take the policy at any rate fixed by the company, but the agent inserted nine per cent. in the application as an indication of his opinion of the proper rate, and the company approved the application, but fixed fifteen per cent. as the rate, and gave the insured the right to decline the policy, which they sent to their agent, but the latter mislaid it, and a loss occurred before the applicant knew the agent had the policy, it was held that the company was not liable, as the minds of the parties were held not to have met upon the rate of premium to be paid.[3] But any words or acts showing an agreement are sufficient. Any ap-

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[1] Rose v. Med. Inv. L. Ass. Soc. 11 Ct. of Sess. Cas. 2d S. (Sc.) 345; s. c. 20 Scotch Jur. 534. An issue having been subsequently tried as to whether there was a completed contract by the acceptance of the terms, and a verdict having been found in the affirmative, it was set aside as against evidence.

[2] Wallingford v. Home Mut. F. & M. Ins. Co. 30 Mo. 46. This decision is based, in some degree, upon the provisions of the charter and by-laws of the company.

[3] Ocean Ins. Co. v. Carrington, 3 Conn. 357; Wilkins v. Tobacco (F.) Ins. Co. 1 Cincin. 349; Winneskeik (F.) Ins. Co. v. Holzgrafe, 53 Ill. 516; Tifft v. Phœnix Mut. L. Ins. Co. 6 Lans. 198. In the case last cited a sub-agent, without authority, had agreed that the policy should contain a provision for refunding premiums. The company sent one which contained no such provision, and the applicant refused to receive it, but sought to hold the company to the agreement of the sub-agent. He was allowed to recover only the premium which he had on application paid to the sub-agent.

propriate act which accepts the terms as they were intended to be accepted, so as to bind the acceptor, just as clearly evidences the concurrence of the parties—the bringing their minds together—as a formal letter of acceptance. The terms, the nature of the office, or circumstances under which it is made or relation of the parties may indicate another mode; and if so its adoption equally binds them.

Where the application and the policy both provided that the contract should not take effect until the first premium was paid, but the applicant refused to pay it in cash because of an alleged though unauthorized promise to receive it in bond, it was held [1] that there was no contract; the company had accepted the proposal contained in the application, but the applicant had repudiated it.

§ 148. **When the Minds Meet.—Contracts by Correspondence.** —The Supreme Court of the United States, in an elaborate case, have laid down the law as to parol insurance, both as to the form and as to the power of a company to retract its acceptance of a proposal to insure. Nelson, J., says: [2] "Several objections have been taken to the right of the complainant to recover. * * But the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore, that the risk proposed to be assumed had never attached. Two positions have been taken by the counsel for the company, for the purpose of establishing this ground of defence: 1. The want of notice to the agent of the company of the acceptance of the terms of insurance; and 2. The non-payment of the premium. The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and

[1] Schwarz v. Germania L. Ins. Co. 18 Minn. 448; s. c. 2 Ins. Law Jour. 449.

[2] Tayloe v. Merch. F. Ins. Co. 9 How. U. S. 390.

this even without communicating notice of the withdrawal to the applicant;—in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract. The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties. In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks, nor with the understanding of merchants and other business men dealing with them, nor with the principles of law settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance. On the contrary, we are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted. This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations. On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected. Such is the plain import of the offer. And besides, upon any other view, the pro

posal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open, until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence. The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st of December, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other. The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and if the process is to be

carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other. It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company. For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed? We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties. In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration, and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance. The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the

terms. This appears also to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes, 'Should you desire to effect the above insurance, send me your check payable to my order, for fifty-seven dollars, and the business is concluded;' obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated. * * * One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances. But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract became complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and accordingly we find him directing, in this case, that it may be paid by a check, payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of the check till it was received by the agent, sufficient to meet it, and that it would have been paid on presentment. It is not doubted that if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient, and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction."

§ 149. The whole question of a contract of insurance, made by correspondence, rests upon the same principles of law as are applicable to any other contract made in that way.

The cases upon the subject are numerous, and the decision just quoted is believed to state the law as it may now be considered as settled; that is, that on the deposit in the post office, beyond the control of the party, of an acceptance of a proposal for insurance made by the other party, the contract is concluded.[1]

§ 150. **Contract is Complete when Proposal is Unconditionally accepted.**—The cases in which a policy has been prepared in pursuance of the application, but not delivered, are more numerous than those where no policy has been made out. Life insurance agents are ordinarily only authorized to receive and forward applications for the approval of the company, though they have sometimes authority to make insurance binding until the answer of the company is received. If the company so far accepts the application as to prepare and forward a policy to its agent for delivery, and if payment of the premium has been made, or if such payment is not a condition of the policy's taking effect, or, being a condition, is waived, the contract is then complete and the company cannot revoke its acceptance, though the policy has not been delivered. This is illustrated by several decisions. Thus in Fried v. Royal Insurance Co.,[2] the agent in this country of a foreign life insurance company gave to the plaintiff a paper, acknowledging the receipt of the premium on a proposal for insurance on her husband's life, which sum, with the proposal, it was stated, was to be forwarded to the head office for acceptance. If it was accepted, a policy was to be issued, and if declined, the premium was to be returned. If the insured died before the decision of the head office was received, it was provided that the sum insured was to be paid. The company accepted the proposal and forwarded the policy to its agent at New York, who never delivered it, withholding it in consequence of information he

[1] The leading cases are Adams v. Lindsell, 1 B. & Ald. 681; Mactier v. Frith, 6 Wend. 103; Hamilton v. Lycoming Mut. Ins. Co. 5 Barr. 339. *Contra:* McCulloch v. Eagle Ins. Co. 1 Pick. 278. In Angell upon Insurance, §§ 39 to 48, is an examination of many of the cases upon this subject

[2] 47 Barb. 127.

had subsequently received. Before the end of a year, the premium for the next year was tendered and refused, and during the latter year the insured died. In an action brought upon the receipt, it was held that there was, in what occurred, a complete contract of insurance; there was a meeting of minds, a consummation of the agreement, and the company, by retaining the first premium, was estopped from denying that the contract was complete, while the tender of the second premium was equivalent to payment. The court say: "The defendants insist that the plaintiff cannot recover, on the ground that the policy was never issued; that the complaint alleges that the policy was never delivered; that delivery is the consummation of the contract; that issuing and delivery are equivalent terms in law, and that there could be no issuing without a delivery. This argument is not sound; it is not consistent with the plain letter, sense, and spirit of the contract. I do not think it possesses even the merit of plausibility. By the demurrer the defendants admit the receipt of the premium for the first year; they admit the power of McDonald, their agent, to make the contract in question, which was an absolute contract of insurance until the proposition should be received at the head office, and which was to be continued upon their acceptance of the plaintiff's proposition; and they admit the acceptance of the proposition, and the issuing a policy in accordance therewith. It was no part of the contract that its binding effect or validity should depend upon any subsequent act of themselves or of their agent, in the actual delivery of the policy so issued to the plaintiff. The acceptance of the proposition and the premium, the making out and authenticating a policy and the transmission of it to their agent, was all the legal delivery required. These acts amounted to the consummation of the contract; the minds of the parties had met, and action had been taken upon it by the defendants; their retaining the premium estops them from denying that the contract was perfect. There was nothing in the accepted proposition that made its effect, or

validity as a contract, to depend upon the actual possession of the policy by the plaintiff. * * The defendants were under the implied obligation of duty, by virtue of the agreement with the plaintiff, to deliver the policy to her. The transmission of it to their agent in New York, is, in contemplation of the terms of the contract and of law, under the circumstances, a delivery to her. * * The refusal to deliver the evidence of the contract, and the refusal to receive the second year's premium, cannot make void a consummated agreement. The tender of the second premium is equivalent to its payment. The death of the person whose life was insured, entitles the plaintiff to recover. The defendants seem to suppose that the consummation of a contract, and the evidence of its ratification, are identical. This is error; a contract may be good, while the evidence of its ratification is wrongfully withheld."

After a trial the case was carried to the Court of Appeals, and the same decision made. The court say:[1] "There is no dispute that the agent had authority to make the precise contract which he did make with the plaintiff, and the acceptance of the proposition contained in it by the defendants is conclusive of their assent to the exercise of such authority in their behalf. The terms of the contract are too clear for construction. It contains a proposition on the part of the plaintiff for insurance of the life of her husband, for which she advanced the usual premium for one year. The defendants by their agent agreed that, if the proposition was accepted at their head office in Liverpool, they would issue a policy in accordance therewith; but if rejected, they would return the premium. If the nominee died before the decision of the head office was received, the sum insured was to be paid in accordance with instructions. It was a present insurance in the event of death before the decision was received, and the only contingency upon which the contract of insurance could fail, was the rejection by the head office of the proposition, and the receipt of such decision before the

[1] 50 N. Y. 243; s. c. 2 Ins. Law Jour. 120.

death of the nominee. To this extent only the assured took the risk of a failure to consummate the contract. That contingency did not happen. The defendants receipted the proposition and forwarded a policy to their agent to be executed and delivered. It was executed by the agent, but never delivered, on the ground of an alleged unfavorable change in the health of the nominee. It is now claimed by the learned counsel for the defendants, that no contract was ever consummated, that it was entirely optional with the company whether to accept or reject; and that the acceptance must be qualified by the standing instructions from the company to the agent, the substance of which, as claimed, is not to deliver any policy if a change had taken place in the health of the assured. This position cannot be sustained. * * The instructions constituted no part of the contract, and were not brought to the notice of the assured, and as claimed to be, are inconsistent with the terms of the contract. The contract is unqualified, that in case of acceptance by the head office, 'a policy will be issued.' If the alleged instructions are controlling, we must interpolate the words, 'unless in the mean time a change shall take place in the health of the nominee.' This would be a material alteration, and one affecting the substance of the contract. The contract of insurance was to take effect from the date of the proposal. If accepted, the risk of an unfavorable change of health after that time, was necessarily assumed by the company. Even death before the receipt of the decision of the company was expressly assumed by it. The assured took the risk that the application was in the prescribed form, and presented a proper subject for life insurance at that time, not that the nominee would continue in such a state of health as to be acceptable to the company for an indefinite period. The company was to act upon the papers presented, and they related to the condition of the nominee at the time they were prepared. If the papers presented showed a proper case for insurance, the risk of rejection by the company was very slight, while the risk of the health of the nominee for

one, two or six months might be very serious. In effect there would be no insurance unless the nominee continued in good health or died, until the policy was delivered. The alleged instructions could have no such effect upon the contract. They could not alter or qualify the terms of the contract to the prejudice of the plaintiff. If the agent made a contract in violation of, or inconsistent with, his instructions, the plaintiff had no notice of it, and the principals afterwards ratified it.

"It is argued that having the power to accept or reject the proposal, the company might do either with qualifications. It is sufficient to answer that they did not make any qualification. The acceptance was absolute, and the supposed qualification is not binding upon the plaintiff so as to vary the terms of the agreement. It was competent for the company to make a contract in entire disregard of the instructions to their agent. They are chargeable with knowledge that this contract is inconsistent with what is now claimed to be their instructions to their agent, and with that knowledge to have assented to it, and it is too clear for argument that they cannot set up the instructions to defeat it. * * The minds of the parties then met, and the mind of each was evidenced by an act upon which the other had a right to rely. The plaintiff said, I will give you so much a year to insure my husband's life, and pay you the first year in advance; to which the defendants answered, I accept your proposal and receive your money, and I will issue a policy. This is a binding contract within all the authorities. * * Although the defendants failed to issue the policy according to their contract, yet they are liable, I think, upon the contract as a contract of insurance, and at all events are clearly liable for damage for not delivering the policy."

§ 151. So where a wife on applying to an agent for insurance on her husband's life paid fifty dollars in accordance with the company's rules, which was to be applied to the first year's premium provided the risk should be taken, and a policy was thereafter forwarded to the agent for delivery, but before it

was delivered the husband died, and the agent, though tendered the balance of the premium, refused to deliver it, it was held,[1] that there was a valid contract for a policy; that upon the taking of the risk the fifty dollars became the property of the company, and the assured became entitled to the policy; and that such a contract was as available to sustain an action for the amount of the insurance as if the policy had been delivered. In a recent case[2] the facts were as follows: one Scurry and wife made application to the company, through one of its agents, for a policy. The agent took Scurry's note for the premium, gave his receipt for the same, and forwarded the application to the home office. The application was rejected, and four days after its date Scurry was notified of its rejection, which he assented to by promising to bring in the receipt (he lived in the country) and take up his note, but died without having done so. It having been held below that the agent's act made a contract, on appeal the decision was reversed, the court saying: "Where an applicant for life insurance signs an application for a policy which contains a statement that 'only the home officers of the company in Macon, Ga., have authority to determine whether or not a policy shall issue on application,' and the agent through whom the application is made gives a receipt to the applicant as follows: 'Received from James R. Scurry three hundred and seventy-five dollars, the same being the payment of insurance in the Cotton States Insurance Company, this receipt being binding on said company until the policy is received,' such contract or receipt is not binding on the company to issue a policy, nor is the company bound by the receipt after the application is rejected. Whether it is binding on the company until action is had by the company on the application, is a question that does not arise under the facts of this case." So although the assured in his application agreed that the insurance was not to be binding till the premium

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[1] Cooper v. Pacific Mut. L. Ins. Co. 7 Nevada, 116.

[2] Cotton States L. Ins. Co. v. Scurry, Supreme Ct. of Ga. Spectator, Nov. 1873, 771.

was received, it was held, on proof that the agent of the insured waived the prepayment and agreed that it should take effect on the approval of the application, and that the insurer knew of and acquiesced in this promise of the agent, that the company was liable, though the policy had not at the time of death been delivered to the assured, but was in the agent's hands, countersigned by him.[1] So where an agent was authorized "to bind the company during the correspondence," but by his neglect the company did not receive and act upon the application until a loss had occurred, it was held[2] that the company was liable.

§ 152. An application for insurance was made to an agent of the defendants, on September 27, and forwarded by him to the company, and approved by the company, as evidence of which they, on October 2, mailed a policy to the agent, insuring the life of the plaintiff's husband for five years from that date. The agent received the policy, on October 5, but the insured had been taken sick, September 29, and had died October 4. The agent therefore returned the policy to the company. During the negotiations for the policy, the company had agreed to take the first year's premium in advertising, which was to continue six months, and the agent had furnished an advertisement which was published, but the price of it was a few cents less than the amount of the premium. It was held that the contract was completed, at latest, on October 2, when the policy was made out, and that there was weighty authority that the acceptance related back to the date of the completion of the application, and that if the premium was not paid in full, it was the fault of the company, in not furnishing sufficient advertisements.[3] In like manner where an agreement for insurance was made, upon March 20, and a loss occurred on the same night, and on the next day a policy was issued, both

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[1] Sheldon v. Conn. Mut. L. Ins. Co. 25 Conn. 207. See also Post v. Ætna (F.) Ins. Co. 42 Barb. 351.

[2] Fish v. Cottenet, 44 N. Y. 538. See also Hubbard v. Hartford F. Ins. Co. 33 Iowa, 325.

[3] Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.

insurer and insured being ignorant of the loss, it was held that the company was liable.[1] In another case, on applying for insurance, the applicant tendered to the agent the premium, and was told by him that he would consider it paid and as on deposit, the applicant being his banker, and was authorized by him to retain it till the policy arrived; the company received the application and returned a policy, but while it was in the mail, on its way to the agent, a loss occurred. The agent received the premium, but in consequence of directions by telegraph, refused to deliver the policy. It was held that the contract was completed before the loss occurred; that the acceptance of the proposal to insure for a premium offered, was the completion of the negotiation, and that the contract could not thereafter be rescinded without the consent of the assured. It was moreover held, that a contract to insure from a time past is valid, and that if a company takes a risk, to commence before the date of the policy, as was expressly done in this case, it is liable, though a loss occurs before the policy is executed and delivered, and that in such a case actual delivery is not essential.[2]

In another case, the plaintiff, on March 28, applied to the agent of the defendants for insurance, and received from him a receipt acknowledging the payment of the premium, and stating that the policy was to take effect on that day at noon. The premium was not actually paid at the time, it being agreed that the plaintiff might send it to the agent at his convenience. The property insured was destroyed on April 7. The premium was sent to the agent immediately after the fire, and he accepted the money, without having heard of the loss, and sent the application, together with the premium, to the defendants. The defendants thereupon, without any knowledge of the fire, forwarded a policy to the agent, but subsequently, on being informed of the loss, instructed him not to deliver it. It was held that when the defendants accepted the premium, and forwarded the policy

[1] City of Davenport v. Peoria M. & F. Ins. Co. 17 Iowa, 276.

[2] Hallock v. Comm. (F.) Ins. Co. 2 Dutch. 268; s. c. 3 Dutch. 645.

to their agent for delivery, the agreement to insure was complete and ratified, as of March 28th; and the plaintiff was entitled to a specific performance of the contract by the delivery of the policy to him and the payment of the amount of the loss.[1] In a similar case, an application was forwarded by the agent to the company, who accepted the risk. The agent then agreed that the policy should be delivered when called for, and the premium be paid within five days. Before that time, and before payment, a loss occurred, and the company was held liable.[2]

§ 153. **Delivery of Policy not Essential.**—In a recent severely contested case,[3] the House of Lords decided various points of interest as to the consummation of the contract, as well as its rescission. They held that a policy purporting to be "signed, sealed and delivered," by two of the directors of an insurance company, in the presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company, must be conclusively taken, as against the company, to have been not only duly signed and sealed, but also duly delivered; that such a policy is complete and binding, as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it, and that it is not necessary that the assured should formally accept or take away a policy, in order to make the delivery complete. A broker was instructed to effect an insurance on a ship for its owner. He gave a "slip" to the authorized representative of an insurance company, which was accepted, and a policy prepared accordingly. When the policy (with the account debiting the broker with the premium) was sent to his office, "duly signed, sealed and delivered," his clerk said there had been a mistake, that the policy ought not to have gone forward, and that there was no premium due. This was repeated by another clerk of the

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[1] Whitaker v. Farmer's Union Ins. Co. 29 Barb. 312.

[2] N. E. F. & M. Ins. Co. v. Robinson, 25 Ind. 536.

[3] Xenos v. Wickham, 2 L. R. H. of Ld.'s Cas. 296.

no complete contract subsisting at that period. It was in form complete, and was shown by the conduct of all the parties to it, to be believed and intended by them all (apart from Lascaridi's fraud) to be also completely in operation. It seems, therefore, to be reduced to this, viz.: Was it essential that the deed should be given out of the defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense." Blackburn, J., says: "The question of fact is, I think, this: Was the policy really, in fact, intended by both sides to be finally executed and binding from the time when the directors of the defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not? If I thought that the parties did not, in fact, intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case, as to what is stated to be 'always' the practice, and the statements there as to what was done in this particular case, shew that the intention of both parties was, that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger. * * Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed. I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the

deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed, presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over saying: I deliver this as my deed; but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. * * I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger was not a delivery to the defendant to the use of the assured." Lord Chancellor Chelmsford said: "As to Lascaridi's acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the plaintiffs, to effect an insurance upon their vessel upon certain terms dictated by them. He prepared the slip according to his directions. When the policy was executed in exact conformity to his instructions, his duty was so far discharged; and without the authority of the plaintiffs he could not refuse to accept it. They had effected, through their agent, a complete binding contract, which they alone could have a right to abandon." Lord Cranworth said: "The efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived or the con-

dition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow. If, therefore, the directors who executed this policy delivered it only conditionally, *i. e.*, to take effect only when taken away by the appellants or their broker, then, as it was not so taken away, it never became operative. But I can discover nothing leading to the inference that there was any such condition attached to the delivery. The expression in the case that the policy is kept by the company until it is sent for by the assured or his broker, can only mean that this is the ordinary course of practice. But such a practice cannot, without more, have the effect of converting that which would otherwise be an absolute, into a conditional delivery; of converting delivery as a deed into delivery as an escrow. The practice referred to is, at least, as consistent with the hypothesis of delivery as a deed as of delivery as an escrow. A policy of this company can only be executed (as I presume) when certain of the directors and officers of the company are assembled: and this explains why it is executed in the absence of the party assured. The practice assumes the previous assent on the part of the assured to the policy to be executed. It is not the practice that the assured should call for or examine the policy before he takes it away, but that he should send for it, evidently treating it as an instrument complete before it is taken away from the office. If, when it has been sent to him, he should discover that it is not conformable with the slip, his only remedy would be a a remedy in equity to get it corrected according to the real meaning of the parties. I know of nothing intermediate between a deed and an escrow. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterwards acquires that character. The practice is, that it should be kept by the company till sent

for by the assured or his broker; not till the assured has had an opportunity of examining it, so as to ascertain that it is conformable to the slip. It can hardly be argued that after the assured has sent for and obtained possession of it, the company is not bound by it, even if it is not in conformity with the slip. Suppose the liability of the company, according to the slip, was to endure for a year, but that by the policy, it is restricted to six months, the assured on receiving the policy, and discovering the error, might well object, and insist on having a different policy; but yet, if a loss should happen within the six months, it surely cannot be doubted that the company would be liable on the policy actually executed. So, if a loss should occur while the policy remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be because it had been completely executed, though never seen and approved by the assured. And if executed, I am of opinion that it became complete when signed, sealed, and delivered. If the usage had been that it should, after being signed, sealed, and delivered, remain in the hands of the secretary till the assured or his broker had done some act signifying his approbation of it, that might have raised a question whether, until that approbation had been expressed, it was more than an escrow. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterwards by some act of the assured."

A delivery "may either be actual—that is, by doing something and saying nothing; or verbal—that is, by saying something and doing nothing, or it may be by both; but it must be by something answering to one or the other, or both these, and with intent thereby to give effect to the deed."[1]

§ 154. **If Policy Requires it, Payment Must be Made or Waiver Proved.**—In life insurance the policy always provides

[1] Washburn on Real Property, 578; affirmed in Heiman v. Phœnix Mut. Life Ins. Co. 17 Minn. 153; s. c. 1 Ins. Law Jour. 415.

that it is not to take effect until the first premium is paid. In such cases, if there is no actual delivery of the policy under such circumstances that a waiver of payment of the premium may be inferred, there must be some satisfactory proof that the premium was so paid, or that its payment was in fact waived. While neither payment nor delivery nor both combined are conclusive, it would on the one hand require very strong proof to show a binding contract where neither had taken place, as on the other hand it would require strong proof to overcome the presumption of a completed contract arising from payment and delivery combined. In a recent case in Pennsylvania,[1] a policy had been duly executed and sent to the agent of the company, but was not delivered to the insured, being withheld until payment of the premium should be made, which had not been done when the insured died. It was held that the contract of insurance was not complete. The court say: "Concisely stated, the argument of the plaintiff's counsel amounts to this, that, if the minds of the parties meet in an agreement for insurance, the policy will be valid without an actual delivery. This position is one to which the court fully accede. A binding contract will not be allowed to fail because the instrument, which is the evidence of it, is retained by the covenantor. His keeping will, under these circumstances, be regarded as that of the covenantee. But, on the preliminary question, is there such a contract? it must always be a material inquiry, whether the party who is alleged to have bound himself did any act manifesting an intention to put the instrument beyond his control, and render it the property of the other party. If he did not, the obligation is *prima facie* incomplete, and those who allege the contrary must make out their case by proof. In the present instance, a policy duly signed and sealed by the defendants was transmitted by them to Andrew Manship, their general agent for the State of Delaware. It was the result of an application which the plaintiff

[1] Collins v. Ins. Co. of Phila. 7 Phila. R. 201.

had made through Manship for an insurance on the joint lives of himself and his wife. Manship had, in the mean time, written to the plaintiff urging the payment of the premium as the condition precedent on the fulfilment ot which the insurance would be effectual. The plaintiff, however, declined to pay till fall, when he hoped to be in funds from the sale of his corn. When the policy arrived, Manship sent it by mail to a Mr. Wharton, who resided in the same village as the plaintiff, with instructions to deliver it on the payment of the premium, but not before. This letter reached its destination on the 6th of November, 1868, and the plaintiff's wife died on the following day, leaving the premium still unpaid. The plaintiff then sent a cheque for the amount to Manship, which was returned. * * It results from this review of the evidence, that the policy never ceased to be in the custody of the defendants. Manship was the general agent of the company, and while the instrument was in his hands, it was in theirs; and when he sent the policy to Wharton, it was with express instructions that it should not be given up until the money was paid. The policy, however, contains a clause, that 'this policy, when signed by two officers of the company, acknowledges and is a valid receipt for the first premium thereon,' and it is contended, that, inasmuch as the instrument in evidence was so signed, it must be regarded as conclusive that the premium was paid. This argument, however, overlooks the fact that while the policy as thus explained is unquestionably a receipt, it is a receipt prepared in the expectation of a payment which was never made. It might as well be contended that a shop-keeper is bound by a receipted bill sent to the house of a customer who does not find it convenient to pay. Even when such an instrument is signed and delivered, it may be explained. Without delivery it is merely inchoate, and of no more real value in the scales of proof than an unuttered thought, or a design which is not executed. Undoubtedly, if there had been evidence showing an intention to trust the plaintiff, or take some one else for the debt and

release him, the case might have gone to the jury and been determined by them. * * Unfortunately for the plaintiff, the evidence in this instance is the other way. He was cautioned by Manship that the defendants did not deal on credit, that the transaction was for cash, and that the policy would not be effectual until the money was actually paid."

§ 155. **Instances of Incomplete Contracts.**—In a recent case in Kentucky,[1] one Kennedy applied for an insurance on his life for the benefit of his wife and children, and in the application agreed that "the assurance proposed shall not be binding on said company until the amount of premium as stated therein shall be received by said company, or an accredited agent thereof, in the lifetime and good health of said" applicant. The policy prepared thereon contained a stipulation: that it was not binding until countersigned by agents at Louisville, "and advanced premium paid." At the time of making the application, Kennedy executed two notes of the same date as the application, the one for seventy-nine dollars and ten cents, due in one year, and the other for eighty-five dollars and thirty-four cents, due on the delivery of the policy; the latter being the amount of cash premium, charge for policy, &c. He was taken very ill, and was in bed when the policy, countersigned by the Louisville agent, reached the local agent who had forwarded the application; hence he would not deliver it. The court say: "This suit and appeal involve the single legal question, whether there was an actual contract or agreement of insurance, which depends on the isolated fact whether said note for eighty-five dollars and thirty-four cents was taken as payment for the cash premium. The local agent left blank signed papers with a gentleman living in the same town with decedent to receive applications, and deliver binding receipts when the cash premium should be paid. This friend or sub-agent of the local agent says, when Kennedy applied for and signed the application for insurance, he explained to him that by paying the cash

[1] St. Louis Mut. L. Ins. Co. v. Kennedy, 6 Bush, 450.

premium and getting the receipt therefor, he would be insured from that day; but if he did not, he would not be insured until the policy was delivered; and if, in the mean time, he should sicken and die, he would not be insured, nor would the policy be delivered if he was not in good health when the local agent received it. To which Kennedy replied he had taken the risk all his life, and could take it until the policy arrived. That he then asked Kennedy to give his note, payable when the policy should be delivered, for the cash premium, costs of policy, &c., to which he readily consented, and executed the note, when he again explained to Kennedy that the risk was on himself until he paid the premium and got the receipt; when Kennedy replied he did not have the money, but hoped he could get it in a few days, at least by the time the policy arrived. This evidence is substantially corroborated by Kennedy's attending physician, who stated that, at the request of the local agent, he went with him to Kennedy's house after the policy had arrived, and while Kennedy was sick as aforesaid, and that the local agent told Kennedy he was placed in rather an unpleasant situation, for he could not then deliver the policy, but hoped that he would soon be justified in doing so; when Kennedy replied he should like to have the policy, but did not wish him to do anything wrong for his benefit. This agent himself states that Kennedy said it was his own fault, for it had been explained to him that he would not be insured until the cash premium was paid. The written application and the language of the note, and the non-delivery of the binding receipt, and the condition of the policy, all fortify this evidence. The note is not payable at all events and on a certain day, but is payable on the delivery of the policy, and corroborates what the sub-agent says was the object of taking it; that is, as a memorandum of the amount of the cash premium; hence no delivery of the receipt. Had Kennedy been in good health when the policy arrived, and had failed or refused to pay this note, he could not have demanded the delivery of the policy, because it was to be paid on the de-

livery of the policy; and as its payment and delivery were to be concurrent acts, neither could demand performance of the other without an offer to perform on his part. Such would be the legal import of these writings unexplained by oral testimony. Had the note been received as an actual, or in place of actual, payment, it would have been payable at all events, and on a certain day, and a binding receipt in all probability given. But even if the note should presumptively be regarded as taken in place of the cash premium, this presumption can be rebutted by parol evidence, because it is but a *prima facie* and not conclusive presumption; and, therefore, whether or not it was received in place of the cash premium, is susceptible of demonstration by parol proof. The note did not, in language or covenant, change the parol contract or obligation to pay the cash premium on the delivery of the policy, but only evidenced such contract by a writing. Had it been a commercial negotiable security, it would the more strongly evidence, at least presumptively, that it was taken in place of or as the cash payment. But neither the writings, when all taken together, nor the parol stipulations as established by the parol proof, evidence an agreed consummated contract. * .* No case has been shown, or can, we apprehend, be found, where the mere execution of a note, especially such a one as this, was ever regarded as conclusive evidence that the condition of paying the cash premium had been performed; but in several instances it was proved that, by the agreement of the parties, notes for the amount were so taken, and when this appears, an unconditional agreement and binding contract is shown. In this case, however, no contract, either written or parol, is proved by which the appellant actually insured the deceased, or undertook unconditionally to issue a policy on his life: 1. Because the covenant in the written application required payment of the cash premium as a condition precedent. 2. Because the note executed was merely the substitution of written for parol evidence of the obligation of decedent to pay said cash premium on the delivery of the policy, and neither

evidenced such payment nor a waiver of such condition precedent. 3. By the written agreement the policy was not to be delivered unless the cash payment was made in the lifetime of said Kennedy, and when he was in good health. 4. This payment not being made nor tendered while Kennedy was in good health, neither he nor his widow and heirs have shown any legal right to demand a delivery of the policy. 5. As no legal right to demand the delivery of the policy has been shown, its recitals of the payment of the cash premium cannot be used as evidence to sustain the suit, for it was but an escrow in the hands of the local agent. 6. The parol evidence, so far from establishing a parol contract, or that said note was taken as a waiver of the condition precedent of paying the cash premium, negatives both."

§ 156. **Incomplete Contracts.**—In a case in Massachusetts the court say: "This case is very simple.[1] It is an action on a policy of life insurance. The plaintiff has no such policy. She undertook to show that the defendants agreed to issue such a policy, and that the terms on which it was to be issued were fully complied with; that the policy was written and executed, and thereby became a valid contract; and therefore, though the paper was not delivered, and remained in the hands of the defendants or their agents, that it is her property, and will support her action. To meet this case, the defendants proved by parol that it was agreed between the parties that the policy should issue, not in addition to, but as a substitute for, a policy previously made, which was to be surrendered; that the earlier policy was not surrendered, but has been enforced and paid. This is a perfect defence to the action. The plaintiff contends that the application and policy together constitute the contract; and that it is not competent to show by parol any variance from the terms of the contract contained in the writing. But this doctrine has no application to the case. The writing remained under the control of the defendants. There was no

[1] Faunce v. State Mut. L. Ass. Co. 101 Mass. 279.

delivery of it, as a complete and perfected agreement. And if it were true that, without delivery, a complete execution of all the terms agreed on to constitute the contract would be sufficient to make it binding, it is first to be determined whether all these terms were complied with. This may be shown by parol testimony, because the evidence is not to vary the contract, but to prove whether any contract was made. No written contract passed from one party to the other; and the point in controversy is, whether the parties agreed that a certain paper, without more, should be the contract. This must, of course, be proved by parol. The defendants voted to issue the policy; but they did so upon the agreement that the former policy was to be surrendered. This condition was not embraced in their vote, but it was understood and agreed to by both parties, and the policy retained until the condition should be performed. No vote or assent of the defendants to the contract was communicated to the other party, except with this condition. The plaintiff has not a delivered instrument, the evidence of a complete agreement, not to be qualified or varied in its legal effect by parol testimony; and it does not appear that the parties have ever agreed that the written paper should become a contract, except upon a condition which has not been performed."

§ 157. In a Massachusetts case,[1] an agent of a company called with the policy upon the person who had applied for it, and offered it, and asked for the premium, but the applicant referred him to a third person, who had promised to pay it, and the agent agreed to call upon this third person, but did not do so, and retained the policy. It was held that nothing had occurred which was equivalent to or a waiver of actual delivery, and that the company was not liable, the court saying: "It does not appear to have been understood or intended by the parties, that a contract of insurance should be effected otherwise than by receipt of the premium and delivery of the policy." This case came before the same court a second time, under the name of Markey v. Mutual

[1] Hoyt v. Mut. Ben. L. Ins. Co. 98 Mass. 539.

Benefit Insurance Co.,[1] the plaintiff having in the mean time married. It then appeared that one Jordan was the general agent of defendants in Massachusetts, with power to appoint sub-agents and subject to certain written instructions and rules of the company for agencies, established by the directors. Wells was a sub-agent, appointed by Jordan, to solicit and receive applications for insurance and forward them to the company, and to deliver policies issued by the company and collect premiums thereon. By the solicitation of Wells, Hoyt, the plaintiff's husband, under date of September 21, 1865, made application through Wells to the defendants for such a policy as the one in suit. This application was forwarded by Wells, through Jordan, to the defendant's office in Newark, from which office, in reply, the policy in suit was sent to Jordan, who early in November handed it to Wells, and Wells on November 4 or 5, having it in his possession, had an interview with Hoyt and the plaintiff, at Ballardvale, at which no other person was present. Hoyt was then ill with typhoid fever, and was lying on his bed. At the close of the interview, Wells withdrew with the policy in his possession, and afterwards returned it to Jordan, who sent it back to the defendants. On the day after the interview, a tender of the premium and demand for the policy were made in Hoyt's behalf at Jordan's office in Boston, and were refused on the ground of Hoyt's illness. He died of the fever on November 23. The plaintiff contended that at the interview there was a valid delivery of the policy to the assured, and an agreement, by Wells, as the defendant's agent, to defer payment of the premium and apply for it to Banks, the foreman of the room in a file factory in which Hoyt was a workman. But it did not appear that Wells ever made such an application to Banks. The plaintiff testified, as a witness, to what occurred at the interview; and Wells gave conflicting testimony in behalf of the defendants. The substance of the testimony of both of them, and the language of the material part of the plaintiff's testimony, are stated in the opin-

[1] 103 Mass. 78.

ion. There were several other witnesses, including Jordan. At the close of the evidence, and before the arguments of the counsel, the judge said, "I shall rule in this case that there is no evidence to warrant the jury in finding that there was any other agreement between the parties than that of a contract of insurance in the ordinary mode by a policy of insurance;" and "I shall then rule that, in order to constitute a valid contract, there must be either a delivery or its equivalent; that, in the absence of that, there must have been a tender of the premium, and a demand for the policy, at a time within a reasonable time, under the circumstances, from the acceptance by the company of the proposition of the assured for insurance; that if, within a reasonable time, under the circumstances, after their acceptance of that policy, with nothing new transpiring which they had not full knowledge of, if the party tendered the premium and demanded a policy, that vested the right of the policy in the assured. I think there is evidence on these two questions to go to the jury." The judge afterwards refused a request of the defendants for a ruling "that there was no sufficient evidence upon which the jury could find a verdict for the plaintiff;" and submitted the case to the jury under instructions substantially as follows: "I instruct you, as matter of law, that she is not entitled to recover, unless there was a policy made and delivered within the lifetime of Hoyt, or such acts done as are in law equivalent to a delivery of the policy. * * The plaintiff claims that, after this application had been made and approved, and the policy had been made, for the purpose of delivery under it (about which facts no controversy is made), there was in point of fact a delivery. If there was a delivery, then the policy is valid, and the plaintiff is entitled to recover. The mere passing of the paper to Hoyt, and his passing it to his wife, does not, in law, of itself constitute a delivery. If it was passed for the purpose of giving the property to the assured, and accepted as such, that is a delivery. If it was originally put into the hands of the assured, without any purpose of passing the property; if while in

her hands an arrangement was made by which the parties understood that the property was from that time forward to be in her, and the policy to be subject to her power, control, and disposal, that would make a valid delivery in law. Where a contract of this kind is made, the presumption is, that the consideration for it (which is the premium, in this case), and the delivery of the policy, are dependent upon each other. But although there is that presumption in the law, yet the parties may act differently from that; and if the authorized agent intends to deliver, and does deliver the policy into the hands of the assured; or if, it being in her hands, he intends that she retain it, and she does retain it as her own, without a cash payment of the premium, then the policy becomes a valid contract, even although the cash premium be not paid. If the policy is obtained, or the retention of it is allowed, upon a statement of the assured in relation to the mode in which payment of a premium can be recovered, which is not true, and the party makes the delivery, or suffers it to be retained, supposing it to be true, then, when he ascertains, or if the fact is, that it is not true, there is not a delivery of the policy. But if the party understandingly permits the policy to go into the hands of the assured, for the purpose of vesting the property, he knowing at the time that he is to look elsewhere for the payment of it, the delivery is a valid delivery, in the absence of all misrepresentation, or fraud, or falsehood. * * * And if, that authorized agent of the company having notified the assured that the policy was made and ready for delivery, the assured declined to take it, there is an end of the contract, and the party cannot recover upon it under any circumstances whatever that are proved in this case. But if, having notified the assured that the policy was ready, and if, on an interview between them, it was mutually understood that it was not convenient on that day to consummate the contract by the payment of the premium on delivery of the policy, but that the contract had not been abandoned by either party, and both parties under-

stood that it was still a contract which might be completed, if then, within a reasonable time—and in law the next day would be a reasonable time—if then, within a reasonable time, there being in the mean time no change whatever in the circumstances, if the party had not become sicker, or the risk increased, or any other fact transpired which changed at all the condition of things from what it was the day before, then a tender of the premium and demand of the policy upon the duly authorized agent of the company will be sufficient to vest the right of the policy in the plaintiff." The jury found for the plaintiff, and the defendants alleged exceptions on questions specified as follows: "Was there evidence proper to submit to the jury upon the question whether there was a delivery of the policy?" "Was there evidence proper to submit to the jury upon the question whether, after an agreement had been entered into by application on the one side, acceptance of the application and making of the policy on the other, there was, within a reasonable time, a tender of the premium and demand for the policy which would vest the right to the policy in the plaintiff?"

The court say: "So far as the case depends upon the arrangement in regard to procuring payment of the premium from Banks, it stands now less strongly upon the testimony than at the former trial. That arrangement is therefore material only in its bearing upon the question whether there was a delivery to Hoyt or his wife, at their own house, upon credit; or a waiver of the immediate payment of the premium as a condition of the transfer of title to the policy. Upon this question the instructions given to the jury at the last trial are full, explicit, and clear in their terms. We see no ground of exception to them on account of anything which they contain. * * * Recurring to the testimony, the statement of the plaintiff in regard to the interview between Wells, Hoyt, and herself, when the policy is claimed to have been delivered, is, in brief, this: 'He came in; my husband was on the bed; he (Wells) made some

commonplace remark, and then said to my husband, I have brought your policy. My husband said he was very glad of it; he had been expecting it for some time. He took and looked at it, and passed it to me, and said, "Here, Eliza, here is your policy." I took it in my hands and glanced it over; and he then said, "Mr. Wells, I am not feeling well enough to attend to this business to-day; but I have made arrangements with Mr. Banks to do it for me." Well, Mr. Wells said that he would go. They had some more conversation. I could not justly remember about the other things; and he arose to go, and I passed him the paper as he arose to go out of the room, and he went over there, or said he would go to Mr. Banks.' To the question, 'What was said when you passed him the policy?' she answered, 'He took the policy, and said he should go to Mr. Banks.' *Q.* 'Did you say anything?' *Ans.* 'I passed him the policy, and said I, "You may want the policy, if you are going to Mr. Banks." And he took the policy.' *Q.* 'Did he ask for it?' *Ans.* 'No, sir, he did not.' *Q.* 'Did your husband state to him what arrangements he had made with Mr. Banks about the policy?' *Ans.* 'No, sir, anything more than that he had made arrangements with him to take the policy.' *Q.* 'Was anything said about paying for the policy?' *Ans.* 'Oh, yes.' *Q.* 'What was said about it?' *Ans.* 'Well, he told me that there was money, —that his money was in the shop, his money that he hadn't drawn, and Mr. Banks would pay for it for him.' *Q.* 'That is, he said that there was money for him in the shop that he hadn't drawn?' *Ans.* 'Money owed to him.' *Q.* 'Owed to him, and Mr. Banks would make arrangements to get it for him?' *Ans.* 'Yes, sir.' * * The obvious purport of this testimony, and, as we think, the only legal conclusion that can properly be drawn from it is, that the policy was handed to Hoyt and his wife for their inspection only, to enable them to determine whether to accept it and pay the premium. At most, it was a mere proffer of the instrument which contained the contract: requiring, upon the other side, acceptance and payment of the premium to give it legal operation and effect as

a contract. The judge rightly instructed the jury that the presumption of law was, that the payment of the premium and the delivery of the policy were dependent upon each other. To our minds the testimony utterly fails to show, or to give the jury any ground for inference, that Wells intended, or that either Hoyt or his wife understood, that the policy became her property by reason of what occurred at that interview. The mere act of passing the manual possession, under the circumstances, does not vest the legal possession in her, nor prove that it was intended to do so; and the jury could not find a verdict for the plaintiff from that fact alone. This being so, the burden is upon the plaintiff to show, by some affirmative evidence, that the real intention and understanding was so to pass the legal title and possession without or before payment of the premium. Not only do the acts and words of the parties, at this interview, fail to furnish such affirmative evidence, but, as it appears to us, they exclude such an inference. Hoyt, feeling too unwell to attend to the business himself, refers Wells to Mr. Banks to do it for him. Wells takes the policy and leaves the house. We cannot conceive of any emphasis, gesticulation, or other indication in the appearance and manner of the witness upon the stand, which can make the plaintiff's testimony containing this statement, convey or consist with the idea that the parties intended or understood that the delivery of the policy was nevertheless complete and absolute, and only the payment of the premium postponed. The testimony of Wells is in utter denial of any delivery, or any arrangement about going to Banks for the premium; and asserts that Hoyt declined to take the policy. We can discover in it nothing which tends to support the plaintiff's case; and the utmost effect of his appearance upon the stand would be to discredit his statements altogether. Upon these considerations, the court are clearly of opinion that the jury were not warranted by the testimony in returning a verdict for the plaintiff upon the ground of a delivery, actual or constructive, of the policy; and that the instructions

permitting them so to return a verdict were, for that reason, erroneously given. * * The proposition we suppose to be substantially this, namely, that the proffer of the policy by Wells, he being fully aware of the condition of health in which Hoyt then was, and not withdrawing it at that interview or then intending to withdraw it, remained an open and continuing proposal to contract by means of that policy, which entitled the plaintiff to accept it within a reasonable time, and, by paying or tendering the premium, to demand the policy; and that such payment or tender and demand would be equivalent to an actual delivery. We cannot so hold the law to be. There being previously negotiations, but no contract, and no purpose to contract otherwise than by a policy made and delivered upon simultaneous payment of premium, the proffer of a policy, even if intended as an offer which was to continue open for acceptance within a reasonable time, would become a contract only by acceptance before it was withdrawn. And it might be withdrawn at any time before it was actually accepted, whether the reasonable time had elapsed or not. One party is not bound by such a proposal until the other is bound by its acceptance. The return of the policy by Wells to the general office in Boston, of which it is apparent that the plaintiff had knowledge, was evidence of such a withdrawal, competent at least to be submitted to the consideration of the jury upon that question. But, further than that, we see no evidence that the offer of the policy by Wells, at the interview in Hoyt's house, was to remain open for acceptance after that interview was ended, except under the special arrangement for doing the business with Banks, of which Mrs. Hoyt testifies; and that arrangement was terminated by the failure of Wells to renew the offer to Banks. In the absence of anything in the terms or mode of the offer to indicate that it contemplates a future acceptance, the presumption is that it terminates with the interview at which it is made. In the aspect case upon which it was submitted to the jury, we thi the instructions in regard to the effect of a tend

mium in Boston to vest the right of the policy in the plaintiff were not correct."

§ 158. In Massachusetts, where the law with reference to mutual insurance companies is administered with especial strictness, it is held[1] that where the by-laws of such a company provided that before the policy should be binding, the insured "shall pay to the treasurer or agent such premium and make such deposit as the directors shall determine," the company is not rendered liable on a policy executed but not delivered, and for which no premium has been paid, though the treasurer had promised the applicant that, if anything should happen, he would see the premium paid, or would take it upon himself to keep the policy good, the court considering that the promise of the treasurer was merely his personal promise, and not one which could bind the company.

§ 159. **Incomplete Contracts.**—In a case in Minnesota,[2] it appeared that on the receipt of an application, the company transmitted the policy to the agent through whom the application was received, with instructions not to deliver it until the premium was paid. The agent called at the store of the assured, who was absent from home, and had left his business in charge of his minor son, and showed the son the policy, telling him that the first annual premium was to be paid, part in cash and part by note. At his request the son signed the note in the name of his father, and the agent took it and put it with the policy in an envelope, and, when the son asked for the policy, told him he would keep it till his father "got home and would wait for the money and keep the policy good until then." The father died without returning home. On this state of facts it was held, that no cause of action was shown; that "independent of the policy, there was nothing tending to show any acceptance of the application or any agreement to insure, and that while there were

[1] Buffum v. Fayette Mut. F. Ins. Co. 8 Allen, 360. To same effect, Mulrey v. Shawmut Mut. F. Ins. Co. 4 Allen, 116. In the latter case there had been no actual delivery of the policy.

[2] Heiman v. Phœnix Mut. L. Ins. Co. 17 Minn. 153; s. c. 1 Ins. Law Jour. 415.

negotiations there was no contract and no purpose to contract, otherwise than by a policy made and delivered upon simultaneous payment of the premiums. * * That the statement of the agent, that he would wait for the money till the insured returned, and would keep the policy good until then, coupled with a refusal to deliver it, showed that it was his intention to hold the policy until the actual payment of the premium, and not to give credit for the cash portion, retaining the policy as a deposit as the property of the assured." The words "keep the policy good" were held to mean that he would not return the policy to the company. The court say, "When we consider that all that was said and done at the interview between Thompson and Isidor Heiman, was said and done in immediate connection with Thompson's positive refusal to deliver the policy, we think there is no reasonable construction of his language or act which will justify the inference that though he refused to give effect to the policy by manual delivery, he intended, or was understood to intend, that he would hold the policy as the property of the assured, thereby making a constructive delivery of it, so that his possession would be the assured's possession, and the policy be as good to her, to all intents and purposes, as if he had made manual delivery thereof. And this inference is still more unwarrantable when we call to mind that upon the testimony introduced by plaintiff, it appears that Thompson was instructed not to deliver policies until the premium was paid, and that in the absence of clear affirmative evidence to the contrary, he is not to be presumed to have disobeyed his instructions and violated his obligation to his principal."

In an unreported case,[1] the application was received from a local agent, through a general agent, and a policy prepared and forwarded by mail to the general agent. It was in the usual form, with the attestation clause reciting that it was

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[1] Dodge v. Mut. L. Ins. Co. U. S. C. C. Ky. MSS

"signed and delivered." Before its receipt by the general agent, he had learned that the applicant had been taken ill, and he retained the policy over a month, when he forwarded it to the local agent, who received it a few hours after the applicant died. The money to pay the first premium had after the application been placed in the hands of a third party, and the local agent notified. It was held that there was no binding contract, because the applicant understood that he must pay the premium before he was insured, and the company had a right to decline the risk at any time before receiving the premium or actually delivering the policy.

Where a broker was employed to effect insurance, and he applied to the company, who delivered to him first a "binding receipt," and afterward the policy, which contained a provision that no insurance was to be considered in force until the premium was actually paid, and the broker showed the policy to his principal, but it was left in the broker's hands, the applicant stating that it was not convenient to pay the money, but that if he was not safe, he would get the money, and the broker replying that he would be safe for thirty days, it was held,[1] that there was no completed contract.

Where the company transmitted a policy issued upon a written application to its agent, who had general instructions to deliver policies only in cases where, at their reception, the applicant was in good health, and it appeared that on October 13, after the application was forwarded, the insured was taken dangerously ill, and remained in that condition when the policy was received by the agent on October 25; and, in consequence, the agent refused to deliver it, though delivery was demanded and the premium tendered, it was held[2] that there was no contract; that the application being only a proposal, the company could accept or refuse it, or accept it upon conditions, and that the instructions not to deliver unless the

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[1] Marland v. Royal (F.) Ins. Co. 71 Penn. 393. The broker is spoken of by the Court as the mutual agent of the parties.

[2] Schwarz v. Germania L. Ins. Co. 18 Minn. 448; s. c. 2 Ins. Law Jour. 449.

party was in good health, constituted a valid condition to the acceptance by the company of the proposal. Where the policy provided that it should not be binding until the first premium was paid, and it was claimed to have been paid by a personal arrangement for credit made with a sub-agent, who had no authority to make any such agreement, and the policy had never been delivered, it was held[1] that there was no binding contract. Where the policy provided that it was "not to be valid until countersigned by the agent," at a designated place, and it was never so countersigned, though delivered by an unauthorized person, the company was held not to be liable.[2]

Where the assured has not received the policy, the burden is on him to show that there was an intention to have the contract considered complete and binding without a delivery of the policy, and if there has been no payment of the premium the contract is *prima facie* incomplete.[3]

§ 160. **Equity Enforces Verbal Contracts.**—Where a verbal contract for insurance has been made, equity will, if a loss has not occurred, enforce the delivery of a policy,[4] and if a loss has occurred, will enforce the payment of the sum insured.[5] And such insurance made without the issue of a policy will, in the absence of evidence to the contrary, be regarded as made on the terms and subject to the conditions contained in the ordinary forms used by the company, where it is apparent that the parties assumed that it would if issued contain such conditions as are contained in policies.[6] It

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[1] Continental L. Ins. Co. v. Willetts, 24 Mich. 268.

[2] Lynn v. Burgoyne, 13 B. Mon. 400.

[3] Heiman v. Phœnix Mut. L. Ins. Co. 17 Minn. 153; s. c. 1 Ins. Law Jour. 415.

[4] Carpenter v. Mut. Safety (F.) Ins. Co. 4 Sand. Ch. 408; Callaghan v. Atlantic (M.) Ins. Co. 1 Edw. 64; Bunten v. Orient Mut. (M.) Ins. Co. 8 Bosw. 448; s. c. 2 Keyes, 667; Union Mut. Ins. Co. v. Comm. Mut. Ins. Co. 2 Curt. C. C. 524; s. c. 19 How. U. S. 318; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; Rockwell v. Hartford F. Ins. Co. 4 Abb. 179; Tayloe v. Mut. F. Ins. Co. 9 How. U. S. 390; Whitaker v. Farmer's Union (F.) Ins. Co. 29 Barb. 312; Post v. Ætna (F.) Ins. Co. 43 Barb. 351; St. Louis Mut. L. Ins. Co. v. Kennedy, 6 Bush, 450; McCrun v. Ætna (F.) Ins. Co. 3 Ins. Law Jour. 169.

[5] Rockwell v. Hartford F. Ins. Co. 4 Abb. 179; Rhodes v. Railway Pass. Ins. Co. 5 Lans. 71, and cases cited under last note.

[6] Eureka (F.) Ins. Co. v. Robinson, 56 Penn. 256; Home Ins. Co. v. Favorite, 46 Ill.

has been said that after all the terms have been agreed upon and a policy prepared, if it is withheld, trover will lie against the insurer for the policy.[1] Where a policy, having been delivered, was returned for correction, but instead of that was destroyed by the agent of the company, it was held that equity would enforce the contract.[2]

§ 161. **Delivery is Presumptive Proof of Completed Contract.**—Cases in which the policy has passed into hands of the assured, arise chiefly where it has been sent or handed to him, and it is claimed, on the one hand, that the delivery was absolute, with an intention to make the contract binding from that time, and on the other hand, that it was so delivered under an express or implied condition, that it was not to be binding until some act was done, usually the payment of the first premium. The question in these cases is, as to what the facts were. Though the policy contains a provision that it is not to be binding, until the actual payment of the first premium, it is held that that condition may be waived, and that an agent, to whom the policy is sent for delivery, has authority to make such waiver. If the assured has obtained possession of the policy, there is a *prima facie* presumption that it was delivered to him, as the evidence of a binding contract unconditionally concluded. All that he has to do at the outset, in an action on the policy, is to produce it. But the company is at liberty to show the circumstances under which the policy was delivered to him, so as to rebut the presumption, and to prove that there never was a binding contract. The principles, governing this class of cases, are well exhibited in two decisions rendered by the court of last resort in New York. In one of them[3] it appeared that the agent of a company sent policies by mail to the applicant, with a statement, that the premium charged was higher than usual, and adding: "Should you decline the policies, please

263. In the latter case, a receipt was given which referred to a policy which both parties knew was not then made out, such being the custom of the parties.

[1] Park on Ins. 4; Marshall on Ins. 303. [2] Chase v. Wash. Mut. Ins. Co. 12 Barb. 595.

[3] Sheldon v. Atlantic F. & M. Ins. Co. 26 N. Y. 460.

return them by return mail; if you retain them, please send me the amount;" and the applicant retained the policies, but did not send the premiums. It was held that, though the policies contained a provision that they were not to be binding until the actual payment of the premiums, this condition was waived, and the policies became effectual upon the assured retaining them, and thereby accepting them, or at all events, that the question, whether this was so, should have been submitted to the jury. At the time of the application the plaintiff had offered to pay the premium, but he had been told he might bring it in subsequently, or they would send for it. On this state of facts, the court say that, the agent's letter "was a proposal to Godfrey, to make the insurance by the delivery and retention of the policy. It involved a waiver of the prepayment of the premium, and some credit for it, more or less. If his proposition was accepted, the insurance became effected at once, and the premium was to be paid afterwards. The terms of his proposal were, that if the insurance was declined, the policy was to be returned by the next mail. If not so returned, it was accepted, and then Godfrey was requested to send or pay the premium. This, however, is not required by the next mail, or with the same promptness as is demanded in his answer to the proposal for insurance. It will be found in the evidence of Godfrey, that he testified, that when he first applied at Lewis's office, in his absence, and offered to pay the premium, he was told by Snow, that he could pay for it the next time he came to Rome, or, if they wanted it sooner, they would send for it. Lewis testified that he had occasionally issued policies without demanding the premium, or sent them, as he did this one. There was nothing in the conduct of Lewis to indicate that he did not suppose, after Godfrey retained the policy, that the contract of insurance was made, and the premium due whenever he chose to call for it. If the company had sued Godfrey for the premium, his retention of the policy would have been strong, and probably conclusive evidence, of his acceptance of the proposal of their agent,

and neither the receipt contained in the policy, nor his omission to reply to the letter of Lewis, would have prevented their recovery. My conclusion upon the whole transaction is, that there was a full waiver of the previous payment of the insurance premium by the defendant's agent, and that there was needed only the acceptance or consent of the party desiring insurance, to make the contract of insurance complete. The evidence which has been adverted to, if not conclusive to show such a consent or acceptance, at all events was sufficient to carry that question to the jury. My own opinion is, that the proof of Godfrey's acceptance of Lewis's proposal, was conclusive."

In the subsequent case of Wood v. Poughkeepsie Mutual Insurance Co.,[1] an agent, who had formerly procured insurance for the plaintiff in other companies which he knew was about to expire, filled up, of his own motion, two policies in the name of the plaintiff, in a company for which he continued to act as agent, and left them with the plaintiff's clerk, during his absence from town, on condition that when he came home he should pay the premium, if he accepted, and return the policies if he declined them. The claim on the part of the plaintiff was, that by retaining the policies he accepted them, and on the part of the defendant, that by failing to pay the premium he declined them. A messenger had been sent three times for the premiums; once the plaintiff was out, once he told the messenger to call again, and once he promised to call and see the agent. Upon this state of facts the court say, "Boggs was a general agent of the company. If he had waived the condition of prepayment, the insurers would have been bound by his act, though it was in violation of their private instructions. The law would have implied such waiver, if the policy had been delivered by the agent without requiring payment of the premium, and had been accepted by the plaintiff as a complete and executed contract. The company would have been held to its engagement, and the assured would have been liable for

[1] 32 N. Y. 619.

the premium, notwithstanding the acknowledgment of payment on the face of the paper. But there was no such waiver, either by the agent or the company; and the policy never became operative as a binding and mutual contract. It is true that it was complete in form, and that it was found in the plaintiff's possession; but the presumption in his favor, which would naturally arise from these facts, was repelled by undisputed proof that it was not accepted by him as a concluded agreement, nor delivered as such by Boggs. The appellant made no application for insurance, either to the agent or the company. Boggs * * filled out the policy in question, with another of a similar character, and, in the absence of Mr. Wood, left them with a clerk in his store, on the condition that when the plaintiff came to town, the premium should be paid if he accepted them, or the policies returned if he declined them. When Wood came, he did neither. The agent sent his clerk three times, with instructions to call for the premium or the policies. The first time, Wood was not in. The next time, he deferred an answer, telling the messenger to call again. On the last occasion, which was the day before the fire, he, at first, directed his clerk to draw a check for the amount of the premium, but subsequently countermanded the order, and said he would call and see Boggs, in reference to a loss he had sustained on other property, as to which he made some complaint. He was sworn on the trial as a witness in his own behalf. He proved no acceptance of the policy by himself, and no waiver of the condition by the agent; but he testified, in substance, that he intended to see the agent the day previous to the fire, and should have done so if he had not forgotten it. It is probable, from all the circumstances, that his purpose was, in the end, to accept the policy, and pay the premium, if the other matter was arranged by Boggs to his satisfaction; but it was at his own peril that he held the question open for advisement. The papers left at his store operated as mere proposals to insure. So long as they were unaccepted, they had no subsisting force. The company, as yet, had no right

of action for the premium, and he had no claim to indemnity in case of loss. The acknowledgment of payment in the policy, like the instrument itself, was provisional, and designed to take effect when he signified his acceptance by sending the premium. Such an acknowledgment does not operate as an estoppel, but merely as evidence of payment; and in this case, it is abundantly proved that no such payment was made. The company waived nothing, even if the instrument be regarded as operative; for it contained a stipulation, that until the payment of the premium, the insurers should not be bound by their undertaking. There was no waiver by the agent of this proviso. On leaving the policy with the plaintiff's clerk, he made it an express condition that the premium should be paid or the policy returned; and all that he afterwards did, was to insist on the performance of this condition. It is claimed that the right of the plaintiff to recover is sustained by the judgment of this court, in the case of Sheldon v. The Atlantic Insurance Co. We do not so understand the effect of that decision. The policy there, was applied for by one Godfrey, at the office of Lewis, the general agent of the company, at Rome. He left the application with Snow, an agent in the same office, who acted in the place of Lewis in his absence. Godfrey offered prepayment of the premium, but Snow declined to receive it, stating that they would send for it, or he might bring it in at some future time. Four days afterward, Lewis, the general agent, inclosed this, with another policy, in a letter to Godfrey, notifying him that the company had increased their rates of insurance, and concluding as follows: 'Should you *decline* the policies, please return them by mail; if you retain them, please send me the amount, $29 50.' There was no intimation in the letter that the waiver of the prepayment by Snow was revoked; and the court construed the requirement of an answer, by return mail, as applicable only to the case of his refusing to accept the insurance for which he had formally applied. The subsequent action of Lewis favored this construction. In a letter written to God-

frey, some three months afterwards, and subsequent to the burning of the property, he threatened to cancel the policy, unless the premium was paid; thus recognizing it as then in force, though subject to future rescission. It would neither be safe, nor just, to extend the doctrine of that case to one like this, where the claim of waiver rests on mere implication, from the appropriation of the policy by the plaintiff, in disregard of the condition, and this, without the consent of the company, or of any one acting in its behalf."[1]

§ 162. In an unreported case in New York,[2] the insured had obtained possession of a policy for the purpose of showing it to his wife, in whose favor it was, and who was to furnish the money to pay the premium; he never returned it, though often called upon to do so or to pay the premium, and he died with it in his possession. In an action brought by the wife, the court held that the delivery, having been conditional, and the condition never complied with, there was no binding contract.

§ 163. The rule to be drawn from these and other cases is clearly this. Where the facts, connected with the delivery of the policy, show that the insured is called upon to manifest by some act that he accepts the policy, it will not be binding without proof of some such act; mere silence will not suffice. If the payment of the premium is the act he is called upon to perform, he must do that act. If payment is waived, he must do some other affirmative act of acceptance. But if he is in substance told that he will be considered as accepting the policy, unless he refuses to do so, mere silence will be sufficient evidence of acceptance. Physical delivery is, however, *prima facie* evidence of a binding contract. Payment with delivery is nearly conclusive evidence of such contract. Payment without delivery is ambiguous. If made at the time of the application, it is of little weight except as throwing light on subsequent acts.

[1] See as to delivery, De Camp v. N. J. Mut. L. Ins. Co. 3 Ins. Law Jour. 89, U. S. C. C. South. Dist. of N. Y.

[2] France v. Am. Pop. L. Ins. Co. Supreme Court, Steuben County, Jan. 1871, James C. Smith, J.

§ 164. **Cases of Conditional Delivery.**—Similar cases to those already cited have occurred in several of the other States, though the application of the rule has perhaps not always been consistent. In a Pennsylvania case,[1] it appeared that Dr. Myers, in November, took a risk on his life, and paid the first semi-annual premium. Before the expiration of the period for which the premium had been paid, he concluded to increase the risk, and to this end applied to agents of the defendants at Pittsburg, for a seven years' policy for $5,000. The terms were agreed on between the agents and Dr. Myers. The annual premium was to be $101 (including the price of a new policy), one-half in cash, and the other half in a premium note at twelve months, with interest. The old policy was to be surrendered when the new one was issued, and one-half of the amount of the first year's premium, deducting what was supposed to be the *pro rata* share of the premium for the unexpired term of the old policy, was paid at that time in cash by Dr. Myers, and his note at twelve months, with interest, given for the residue. The application was to be approved by defendants and the risk then commence. On the 22d March, Dr. Myers was notified by the agents that the rules of the company required a re-examination by a physician, and they transmitted to him a blank for that purpose. This re-examination was had and sent to defendants. On the 4th April, the policy on which this suit was brought was sent by defendants to the agents, and they, without countersigning it, as required by the policy, forwarded it to Dr. Myers, at Cincinnati. He was informed by them at the same time, that they had "made an error in the terms of a seven year policy, which requires the whole of the premium to be paid in cash;" and that if he did not wish to comply with these terms he should return the policy. The premium was payable semi-annually. In the letter of the agents they said: "Your first payment is $49.75, April 4th, from which is to be deducted one month's upon your former policy, or one-sixth of your payment upon said policy, which is $3.32½,

[1] Myers v. Keystone Mut. L. Ins. Co. 27 Penn. 268.

leaving for your first payment, $46.42½, upon which you have paid us $43.85. The balance yet due us on first payment is $2.57½. If you can conveniently retain this policy, you will please mail the former one to us for the reasons above stated. Cash policies are the most profitable, and if you will consider the matter you will agree with us; yet, Doctor, do not hesitate to return this policy if you do not wish to comply with the requirements of the seven year rates or rules, and we will refund to you the amount paid us. But we hope you will retain this policy." No reply was ever received from Dr. Meyers. He did not pay the balance, $2.57½, nor did it appear that he returned the first policy, although it was in evidence that search had been made among his papers after death, and that it could not be found. He retained the second policy, and immediately before his death, handed it to his executor, as of importance to his wife. He died in August. The court say: "Was there a final delivery? Here we must refer to the letter accompanying the policy. It shows that the company had not accepted the terms which had been arranged between Myers and the agents, but had prepared a policy on different terms. Of course, therefore, Myers had as yet made no contract. His proposal was not accepted, but another proposal in the shape of a new policy was sent to him, and his acceptance of this proposal, according to its terms, was essential in order to give it the character of a contract. He was told in a letter that the new terms 'require the whole of the premium to be paid in cash, which if you don't wish to comply with, you can return this policy, and we will return to you the amount paid us with your notes:' and he was further informed that there was 'a balance yet due on the first payment, of $2.57½.' This, therefore, was very plainly a conditional, and not final, delivery; a proposal and not a contract. It was to be a final delivery as a contract if Myers agreed to it, accepted the new terms, returned the old policy, and paid the balance; and we have no evidence that he did either, except by his retention of the new policy, which certainly is no evidence of the return of

the old one, or of the payment of the balance, and cannot possibly be called an acceptance so long as any single thing remained open for dispute or treaty, or anything to be done remained undone."

In a Missouri case,[1] a policy was sent to the assured with a premium note, which was to be signed by himself and a responsible indorser, and it was understood that until the note was returned, the policy did not take effect. The company was held not liable upon a loss occurring before the note was so signed and indorsed.

Where a policy was expressed to be for one year from its date, and provided that it was in consideration of a premium "to be actually paid to this company within fifteen days from that date," but there was a condition that the company was not to be liable "until the premium therefor is actually paid," and a loss occurred within the fifteen days, but before the premium was paid, and the premium was tendered after the loss and within the fifteen days, it was held[2] that, though the policy was delivered, it had not attached, for actual payment was a condition precedent to the attaching of the policy, and the property having been destroyed within the time limited, but before the tender, there was nothing upon which the risk could attach.

In a recent case, the deceased made application to the partner of the agent of a company for an accident policy for a year, and the partner subsequently sent him a policy which the agent had previously countersigned in blank. The premium was not paid, though the policy contained a provision that it was not "valid until the premium is actually paid." About three weeks after the application, the agent having returned, met the applicant casually, and told him he had an item on his book against him; the applicant stated that he was afraid he made a mistake in stating his age, and promised to call and see it. The agent called his attention to the fact that the policy was not valid until the premium was paid, and he

[1] Bidwell v. St. Louis Floating Dock & (F.) Ins. Co. 40 Mo. 42.

[2] Bradley v. Potomac (F.) Ins. Co. 32 Md. 108.

said he understood it. Two days later, he called, corrected his application, and promised to pay the next day. Nine days later he wrote to the agent that he would find the premium at the post office of an adjoining town. The agent called twice, but found no letter, and a few days later the applicant was killed. In his monthly report to the company, forwarded after the death, the agent charged himself with and paid the amount of the premium, but stated the facts, and the company at once returned the report and check. The agent denied that he gave the applicant credit for the premium, and said he never did so unless there was an agreement that he should become personally liable to the company, which did not exist in this case. At the trial the plaintiff was nonsuited, but on appeal it was held [1] that the question, whether there was an intention to give credit, should have been left to the jury.

§ 165. **Cases where Delivery and Contract Held Completed.** —In Ewing v. Piedmont & Arlington Insurance Co.[2] there was an agreement known to the company that a large portion of the first premium should be paid in advertising, but when the policy was presented and the cash portion demanded, payment was refused because it was claimed that all of the premium was to be paid in advertising. It was then agreed by the agent that time should be given in which to pay. While matters were in this situation the applicant was taken ill, and a friend called at the office of the local agent and paid the balance of the premium to one occupying the same office, and who undertook to act for the agent, and gave a receipt for the money. The substitute then went to the local agent, asking that the policy be forwarded, which he did, countersigning it the day he forwarded it, which was after the death of the applicant. It was held that if the jury found that the local agent had ratified the acts of his sub-

[1] Kidder v. Traveler's Ins. Co. N. Y. Supreme Ct. 6 Alb. Law Jour. 127.

[2] U. S. Circuit, North. Dist. of Mo. Nov. 1873.

stitute, the company were bound by the delivery, and were liable on the policy.

In a New York case,[1] Thompson and Dix were appointed, in October 1868, the agents of the defendants at Glens Falls. At the time of their appointment, the general agent of the defendants suggested to Thompson that he should insure his life; and an application was made out and forwarded. On Oct. 24, a policy was returned by mail to the agents. Thompson himself took it from the mail and delivered it to his wife, telling her he had paid the premium. He was taken sick the next day, and died on November 5. On that day the defendants telegraphed not to deliver the policy. At the time the general agent suggested the taking out of a policy, he borrowed some money of the agents for his travelling expenses. It was claimed that this loan was to be repaid by the premiums thereafter collected, but there was no special reference to Thompson's premium, and the company had no knowledge that the loan was made. After the death, the surviving agent, who was one of the witnesses who proved the delivery of the policy to the plaintiff, reported to the company that it was still on hand and the premium unpaid, but in February following he reported the premium as having been paid on Oct. 20, and sent a check for it, which the company returned. The company denied that there had been any delivery of the policy, and claimed that no premium was paid; that the loan to the general agent did not bind the company, and that though the agent might perhaps have bound the company by a delivery of a policy to a third party without the payment of premium, still, a delivery by the agent to his wife could have no such effect; but the court overruled the defence, and held the company liable, on the ground that there was evidence from which a jury could infer that the advance of the money was "not a loan to C. F. Thompson on his individual credit, but an advance by the sub-agent to the general agent as such, on account of the premiums which the former expected to collect for the defend-

[1] Thompson v. Am. Tont. L. & Sav. Ins. Co. 46 N. Y. 674.

ant, including the premium which would become payable on his wife's policy, in case the company should accept the application cotemporaneously made for that policy," and that the acceptance by the wife of the policy procured by her husband without her previous authority, was a sufficient adoption of his act.

In one case an agent authorized to receive applications delivered a "binding receipt," by which it was agreed that the first premium had been paid, and that he was to be "insured from the date of that receipt, in accordance with the policies of said company, the policy to be delivered when issued, and the amount, the receipt whereof is acknowledged, to be repaid to him in the event of said application being declined by the company." The cash portion of the premium ($160) was paid by an agreement on the part of the agent to satisfy the company therefor, he being indebted to Negland, the applicant. For the balance, it is claimed, a note was given. The agent failed to comply with this contract. The application was received by Conklin, the general agent, about two months after its date, and forwarded to the principal office. On the same day he wrote to Negland that the agent had ceased to be in the employ of the company. A few days later, Negland wrote to another agent, forwarding the "binding receipt," claiming that he had paid one-half of the premium and executed his note for the balance, and asking that, in case the company did not intend to ratify the contract of insurance, his money be refunded and his note returned. This letter was forwarded to the general agent to whom Negland soon afterward wrote to the same effect. The latter answered regretting the complications growing out of the contract of the original agent, and proposing to deliver the policy if Negland would pay $82, and execute a new note in lieu of the one the agent had failed to deliver. This was accepted by Negland, and the policy was delivered, soon after which he died. On this state of facts the company was held liable.[1]

[1] Miss. Valley L. Ins. Co. v. Negland, Ky. Ct. of Appeals, 1 Am. Law Rec. 758.

§ 166. Where the agent received from the company a policy on his own property and charged himself in his account with the premium, in accordance with his general instructions, it was held binding.[1] Where two companies were in the habit of reassuring each other, and by the course of business as any premium came due from one company to the other a receipt was given, and in periodical settlements a balance was struck which was paid, it was held that the premium was paid at the time the receipt was given.[2] Where credit is given to the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment.[3]

§ 167. **Unconditional Delivery by Agent in Violation of Orders.**—In a recent case in the Supreme Court of the United States, the agents who transmitted the application received the policy, which they inclosed, with two notes for the credit portion of the premium, to the applicant, who signed and returned them by mail. In their letter inclosing the policy the agents said, "The cash payments we will get of Scott when the proper time arrives." They subsequently called upon that person for the cash premium, but he refused to pay it as he had agreed to do, and the agents gave notice of his refusal to the applicant for the policy, and requested him to make the payment. He acknowledged the receipt of their letter, and promised to procure a draft for the amount, and send it to them in a few days, but he did not send the draft, and the agents wrote him again informing him that the draft had never come to hand, and expressing their fears that if the payment was not made soon he would lose his policy, adding that the payment had been delayed so long that he would have to add interest to the premium, amounting to one dollar and thirty-four cents. Payment being still neglected, and the agents having learned from Scott that the person insured was "quite sick," they informed him by letter

[1] Lungstrass v. German (F.) Ins. Co. 48 Mo. 201.

[2] Prince of Wales L. & Ed. Ass. Co. v. Harding, 1 E. B. & E. 183.

[3] Brooklyn L. Ins. Co. v. Miller, 12 Wall. 285; s. c. 1 Ins. Law Jour. 195.

that his policy was forfeited, and inclosed to him the two notes given for the credit portion of the premium, but the letter did not "reach his home" till after his death. The court held[1] that the company was liable; that though an agent is instructed not to deliver a policy without receiving the premium, the company is still liable if he delivers it in violation of his instructions; that where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended, and where a credit is intended the policy is valid though the premium was not paid at the time the policy was delivered; that where premium notes are given, and there is no evidence to impeach the *bona fides* of the transaction, the company must be held to assume a reciprocal obligation, and that the acts detailed clearly constituted a waiver of payment.

In Southern Life Insurance Co. v. Booker,[2] the policy was on the life of the husband of the plaintiff in her favor. The application was made to an agent in New Orleans, and the policy was forwarded to him. By the terms of the contract, three-fifths of the first premium was to be paid in cash, and the remainder in a note at twelve months on which the interest was to be paid in advance. The agent was instructed to deliver policies only upon actual payment, and the application provided that the policy should not be binding until the premium had been received by the company or its authorized agent. The agent, however, delivered the policy without the cash payment, taking the note of the insured for it. After this he ceased to act for the company, and his successors drew a draft on the insured to the order of the company for the amount of the cash premium, which he accepted, but did not pay at maturity; after maturity, however it was surrendered and the insured gave a note for the amount, payable two years later, which note was taken by the authority of the company, but was in turn not paid, though frequently demanded. On issuing the policy, the company reinsured a

[1] Brooklyn L. Ins. Co. v. Miller, 12 Wall. 285; s. c. 1 Ins. Law Jour. 195.

[2] Not reported. Supreme Court of Tennessee.

part of the risk with another company, and on receiving proofs of death notified the latter company. It was held, that the agent had authority to waive the payment of the cash portion of the premium, and that he did so, and that the policy took effect on delivery by him, notwithstanding the provision in the application, the note or promise of the party having been accepted as cash. It was furthermore held, the jury were justified in holding that the company, by accepting the draft and the note and by procuring a reinsurance, had ratified the act of the agent even if it were originally unauthorized.

§ 168. In Massachusetts, however, it is held that a stipulation that the policy shall not be binding till the premium is paid, is neither complied with nor waived by a payment made to the agent through whom the application was made and the policy delivered, if the policy expressly provides that every agent is to be considered the agent of the applicant and not of the company.[1] In a recent English case,[2] the assured, having previously dealt with an insurance agent, while the latter was acting as agent for one company, applied to him for insurance, supposing he was still acting for the same company. On receiving a receipt, showing that the company was changed, the assured did not at first remark it, but on noticing the fact, wrote back to the agent that he did not want to change the company if the old one was willing to continue the insurance, and that he should want to be satisfied as to the standing of the new company before he consented. The receipt declared him insured for one month or till the proposal was declined. Before anything further was done, a loss occurred, and it was held that the company named in the receipt was liable, the court holding that the letter of the insured was not a repudiation of the contract, but an expression of an intention to investigate while holding on to the insurance for a month.

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[1] Mulrey v. Shawmut Mut. F. Ins. Co. 4 Allen, 116. This decision is influenced by the strict rule adopted in Massachusetts as to waiver by mutual companies.

[2] Mackie v. European (F.) Ass. Co. 17 W. R. 987; s. c. 21 L. T. N. S. 102.

§ 169. The case of Badger v. American Popular Life Insurance Co.,[1] was one where the insurance was on the life of an agent of the company. A policy on his own life had been delivered to an agent, with a right to take it on countersigning it, and paying the premium, but, if he did not take it, he was to use it as a sample. After his death, it was found among his papers, not countersigned, and the premium was never paid. There was evidence that he had expressly declined to take the policy and the company had cancelled it on their books. The court, however, place their decision in favor of the company entirely on the ground of the failure to countersign the policy. They say, "The defendants sent to Almarin F. Badger, the plaintiff's intestate, the policy in question, containing the following clause: 'Nor shall this policy be in force until it is countersigned by A. F. Badger, agent at Boston.' He received the policy and had it in his power to make it a valid contract by countersigning. But he did not do this, and consequently the policy, never became in force. We need not inquire into the motives of the company for inserting this condition; nor into his motives for neglecting to comply with it. It is sufficient that the defendants had a right to insert it, and to insist upon it. There is no evidence tending to show that it was waived."[2]

§ 170. Where the agent of an insurance company was authorized to make insurance on vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration, actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself, under his general authority, and having every element of a perfect and valid contract, it was held by the Supreme Court of the United States,[3] that the fact, that after the execution and delivery of the policy, the party insured signed a memorandum thus, "The insurance on this application is to take effect when approved by E. P.

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[1] 103 Mass. 244.

[2] As to countersigning, see *post*, § 181

[3] Ætna (F.) Ins. Co. v. Webster, 6 Wall. 129.

D., general agent," &c., did not make the previous transaction a nullity until approved; and that though the general agent sent back the application, directing the agent who had delivered the policy, to return to the party insured his premium note, and cancel the policy, the insured was still entitled to recover for a loss, the agent having neither returned the note nor cancelled the policy. Chase, C. J., in delivering the opinion says: "What, then, is the true effect of the memorandum? In strictness, and taken apart from the transaction, its terms make the validity of the policy depend upon the approval of the general agent. 'The insurance on this application to take effect when approved by E. P. Dorr. general agent at Buffalo.' But it is clear that such was not the understanding of the parties, nor of the general agent himself. The policy issued was perfect in form and substance; the premium note was in the usual form, and for the proper sum; the delivery of the policy and the receipt of the note were significant acts. If the general agent had never acted upon the application at all, and the term of insurance had expired without loss, it will hardly be maintained that the insured could set up his omission or neglect in this respect as a defence to an action upon the premium note. The transaction, then, was not a nullity until approved. It must be regarded, we think, as an insurance of the same character as that passed upon in the case from Cowen's Reports.[1] The memorandum, considered in connection with other parts of the transaction, must be treated as, at most, the reservation of a right, not however to be arbitrarily exercised by the general agent, to disapprove the insurance and annul the contract on notice to the insured, and on return of the premium note. The evidence shows that it was in this light substantially, that both the agents regarded the transaction until after the loss. * * It is a necessary consequence of these views that, in the absence of all notice of disapproval until after the loss, the policy must be regarded as valid and effectual." [2]

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[1] Perkins v. Wash. (F.) Ins. Co. 4 Cow. 645.

[2] Before leaving the subject of delivery, attention should be called to the fact, that

§ 171. **Date of Commencement of Risk.**—Ordinarily where a policy has been issued, the risk commences from the day of its date unless another day is expressly named in it[1] or may be inferred from its terms.[2] It may, however, be shown that for want of delivery, failure to comply with some condition precedent or other cause, it did not take effect till a subsequent day, and did not therefore apply to a loss which occurred before its delivery but after its date.[3] Though a contrary opinion was once expressed,[4] the words "from the day of the date" and "from the date" are now held to mean the same thing. They are expressions of doubtful import, which must be interpreted according to the intention to be gathered from the whole instrument, and as they are the words of the insurers they are, in a case of doubt, to be taken most strongly against them.[5] Of course if the date of its taking effect is stated in the policy, that is conclusive.[6] But where the policy was made out in October, and not delivered till December, when the premium was paid and an indorsement was at that time made on the policy changing the contract, it was held that the contract did not commence till December.[7]

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it is often affected by considerations connected with the power of the agent, and that the question is discussed in the chapter on the agents.

[1] Lightbody v. North Am. (F.) Ins. Co. 23 Wend. 18; Keim v. Home Mut. F. & M. Ins. Co. 42 Mo. 38; Lefavour v. Ins. Co. 1 Phila. R. 558.

[2] In Ruse v. Mut. Ben. L. Ins. Co. 23 N. Y. 516, it appears from the original papers, though the case as reported does not show it distinctly, that the application, having been received in Georgia, in April, was forwarded to the home office in New York, where a policy was prepared, dated in April, and sent to the agent in Georgia. It contained a provision that it was not to be valid till countersigned by the agent and the first premium paid, which was not done until July. It was contended that the policy, therefore, took effect only from July, and that the year for which the premium was paid did not expire till the following July: but, as the policy expressly provided that the premium was "to be paid on or before the tenth day of April, in every year," and that it should be void if not paid on that day, the court considered the point not well taken. See also Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.

[3] Atlantic (F.) Ins. Co. v. Goodall, 35 N. H. 328.

[4] Sir R. Howard's case 2 Salk. 625; s. c. 1 Ld. Raym. 480. This was a case of life insurance effected in 1697 for "one year from the day of the date thereof." The insured died after the commencement and before the end of the last day, and the insurer was held liable, because, as was said, the law takes no note of fractions of a day, and the year is not complete till the day is over.

[5] Pugh v. Duke of Leeds, Cowp. 714; Park on Ins. 930.

[6] Lefavour v. Ins. Co. 1 Phila. R. 558; Am. Horse Ins. Co. v. Patterson, 28 Ind. 17.

[7] Gloucester Man. Co. v. Howard F. Ins. Co. 5 Gray, 497.

Where application for insurance was made on the 18th, and the agent agreed to issue the policy and send it to the applicant on that day, and the policy was in fact so issued, dated on that day, but was not delivered or the premium paid till the 22d, it was held that it took effect on the 18th.[1]

§ 172. Under some circumstances a policy may, even in the absence of express provision of that nature, take effect prior to its date. In a case in Indiana, where a horse was insured by a policy, which by its terms was not to apply to animals diseased at "the time of insurance," the jury found that the contract was made March 9, but the premium was paid March 14, on which day a policy was issued for a year, which was by its terms to commence March 9. The horse had been taken sick, March 13, and died, March 14, but the company was held liable.[2] So where an agreement for insurance was made, March 20, and a loss occurred the same night, and the next day a policy was executed and delivered, both parties being ignorant of the loss, the company was held liable.[3] Where a policy was issued covering the period "from the 14th February, 1868, until the 14th August 1868," a doubt was expressed whether it covered a loss which might have occurred on the 14th February, 1868, though it undoubtedly included the 14th of August, there being some evidence in the policy that such was the intention.[4]

§ 173. Where one company reinsured a risk previously taken by another company, it was held that a policy, which on its face purported to be an insurance for a year, and which contained no statement when the year was to commence, covered a loss which, unknown to both parties, had occurred some weeks before its date and issue.[5] In this case, the plaintiff had insured a life in a distant State, for a year from

[1] Hubbard v. Hartford F. Ins. Co. 33 Iowa, 325.
[2] Am. Horse Ins. Co. v. Patterson, 28 Ind. 17.
[3] City of Davenport v. Peoria M. & F. Ins. Co. 17 Iowa, 276.
[4] Isaacs v. Royal (F.) Ins. Co. 39 L. J. Exch. 189.
[5] Phil. L. Ins. Co. v. Am. L. & Health Ins. Co. 23 Penn. 65.

February 24, and the policy gave the insured a right to continue it on further payment. The plaintiffs applied to the defendants to reinsure part of the amount. The latter knew all the facts in the case, but the policy issued by them did not show that it was a reinsurance. The court held that as the defendants knew the plaintiffs had an interest in the life of the insured, only for a year from February 24, and as the premium taken by them was measured by the premium received by the plaintiffs, it must be held that it was a reinsurance, a taking of a share of the original risk, and that, therefore, the year named in the policy commenced on February 24, two months prior to its issue.

§ 174. **Equity Reforms Written Contracts.**—Equity will reform a policy, if it fails to express the intentions of the parties, even though the failure arose from ignorance of law.[1] But a policy will not be reformed or corrected except upon the most satisfactory evidence of material mistake. The actual agreement and the error must be established by clear evidence of the understanding of both parties as to what the contract was intended to be,[2] and they must both have intended the same thing; their minds must have met.[3] Therefore, though the agent and the assured agreed to the same thing, but the agent, having no authority to conclude any contract, reported it to the company, but stated it incorrectly, it was held that there was no contract to reform.[4] So where the agent made a mistake in the application, which the applicant signed supposing it to state the real agreement, and the agent forwarded it to the company,

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[1] Oliver v. Mut. Com. M. Ins. Co. 2 Curt. C. C. 277; Franklin F. Ins. Co. v. Hewitt, 3 B. Mon. 231; Phœnix (F.) Ins. Co. v. Gurnee, 1 Paige, 278; Keith v. Globe (F.) Ins. Co. 52 Ill. 518; North Am. (F.) Ins. Co. v. Whipple, 2 Biss. 418.

[2] Oliver v. Mut. Com. Mar. Ins. Co. 2 Curt. C. C. 277; Collett v. Morrison, 9 Hare, 162; s. c. 12 Eng. Law & Eq. 171; Tesson v. Atlantic Mut. (F.) Ins. Co. 40 Mo. 33; Phœnix (F.) Ins. Co. v. Hoffheimer, 46 Missis. 645; Guernsey v. Am. Ins. Co. 17 Minn. 104; Van Tuyl v. Westchester F. Ins. Co. 6 Chic. Leg. News, 144; Parsons v. Bignold, 13 Sim. 518.

[3] Ledyard v. Hartford F. Ins. Co. 24 Wisc. 496.

[4] Fowler v. Scottish Eq. L. Ins. Soc. 28 L. J. Ch. 225; s. c. 4 Jur. N. S. 1169; *ante* § 134.

which issued a policy in accordance with its terms, it was held that it could not be reformed, because there was no proof that the agent had any authority to make a completed contract, and without such proof there was no evidence of mutual mistake.[1]

§ 175. **Rescission of the Contract.**—A contract which has once taken effect may terminate before the extreme limitation fixed in it either by a rescission, or by a breach of some of its terms.[2] As to a rescission, this usually occurs through an exercise of a power to that effect reserved in the policy, which reservation is from the nature of the contract rarely or never found in a life policy. If the rescission is alleged to have been made by agreement of the parties, it must be shown that the minds of the parties met on the agreement to rescind. Thus where the insured refused to pay a note, the non-payment of which did not cause a forfeiture, and declared that "he would not have anything more to do with the company, and abandoned the whole thing," but the company retained the note and kept the policy, it was held,[3] there was no rescission. Where, however, there is a power to cancel, on giving notice, and a return of premium, there must be an actual return or tender of the money.[4] And the notice must be that the insurance is terminated, not that it will be so at a future day. Where a policy was effected through an agent for a year, and for any future time for which the premium should be paid and indorsed on the policy or otherwise acknowledged in writing, and the policy had been several times renewed by the agent, who indorsed it on the policy, but after the last renewal the company instructed the agent to return the premium and cancel the policy, but the agent, though he communicated the direction to cancel to the insured, did not re-

[1] Guernsey v. Am. (F.) Ins. Co. 17 Minn. 104.

[2] Van Valkenberg v. Lenox F. Ins. Co. 51 N. Y. 465. The effect of a state of war is considered in the chapter on that subject.

[3] McAllister v. N. E. Mut. L. Ins. Co. 101 Mass. 558.

[4] Ætna (F.) Ins. Co. v. Maguire, 51 Ill. 342; Hathorn v. Germania (F.) Ins. Co. 55 Barb. 28; Goit v. Nat. Prot. (F.) Ins. Co. 25 Barb. 189.

turn the premium, it was held that the company was liable.[1] Where the company, having issued a policy without requiring the payment of the premium, but having reserved a right to cancel it, gave notice that unless it was paid by a certain day, they would cancel the policy, it was held that the premium not having been paid, the company had the right to treat the policy as rescinded on the day named, and that no further act was necessary on their part to effect a rescission.[2] Where, in 1846, there was a parol contract for a continuous insurance from year to year, until one party or the other should dissent, in pursuance of which the company were to send the renewal receipts and to call for the premiums, but, in 1847, the company demanded a larger premium, and the insured paid a part only of the premium for that year, promising to pay the remainder, it was held that the continuous contract, made in 1846, was terminated by the demand for an increased premium, and that the company was not thereafter bound to send for the premiums, and that, if the insured did not pay them, the contract lapsed, and the company was not liable for a loss which occurred in 1848.[3] But where the insured is induced to sign a paper cancelling the policy, by the false representations of an agent of the company, he may still sue on the policy.[4]

It would seem that if a company is declared bankrupt on its own petition, the contract is in law so far affected that the policy will not be forfeited by a subsequent failure to pay premiums.[5]

§ 176. A case in Louisiana presented a singular state of facts. The agent of the company gave to an applicant for insurance a receipt for a certain sum of money, as premium for one year's insurance on his life, the receipt providing that

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[1] Franklin F. Ins. Co. v. Massey, 33 Penn. 221.

[2] Bergson v. Builders' (F.) Ins. Co. 38 Cal. 541.

[3] Trustees of First Bap. Church v. Brooklyn F. Ins. Co. 28 N. Y. 153.

[4] Holden v. Putnam F. Ins. Co. 46 N. Y. 1.

[5] Re Albert L. Ins. Co. 22 L. T. N. S. 92; s. c. 9 L. R. Eq. Cas. 703. This case arose under the English "winding up" act. The question of damages in such case will be considered hereafter.

if the risk was accepted, a policy should be issued within thirty days by the home office; "but if rejected, this temporary policy shall become void, on receipt of such rejection at this office, when a *pro rata* amount of the premium received shall be returned." After the death of the insured, which occurred several months subsequent to this transaction, the company, not having issued a policy because it had been waiting for a physician's certificate, directed the agent to return the sum paid, except a *pro rata* amount, stating that the application was declined. But it was held, that the temporary policy did not terminate at the end of the thirty days, and the company were liable. The court say: "The answer admits Lathrop's authority to enter into said agreement. The first question, therefore, is: 'Did the temporary policy terminate at the expiration of the thirty days?' We are satisfied that it did not so terminate. The thirty days were fixed as the period in which the policy was to be exchanged for one from the parent office, if the risk should be accepted by the parent office. This period was in the interest of the company, and was for the purpose of enabling the parent office to reject, if they should see fit, the contract entered into by their agent. And it was their duty to forward the rejection of the contract made by their agent to the office at New Orleans, within the thirty days, and immediately on receiving notice of the contract made on their behalf by their agent. * * * If the policy should be rejected by the company, it did not annul the contract made by their agent for the past; it terminated it for the future only. The insured was to receive back his premium *pro rata* for the time remaining, and as a consequence of the retaining of the premium, between the date of the temporary policy and the notice, the company were liable to the risk during the same period. We have no doubt of the liability of the company upon the instrument produced in evidence."[1]

§ 177. **Equity may Cancel Policy.**—A court of equity may declare a policy void, and may order it delivered up to be cancelled, either because of fraud in the procurement of the

[1] Kennedy v. N. Y. L. Ins. Co. 10 La. Ann. 809.

policy, or because of the violation of its conditions.[1] But it is discretionary with the court to sustain the bill or not,[2]

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[1] Barker v. Walters, 8 Beav. 92; Prince of Wales Ass. Co. v. Palmer, 25 Beav. 605; Thornton v. Knight, 16 Sim. 509; Wittingham v. Thornborough, 2 Vern. 206; s. c. Prec. in Ch. 20; 2 Eq. Cas. Abr. 635; Wilson v. Ducket, 3 Burr. 1361; De Costa v. Scandret, 2 P. Wms. 170; s. c. Eq. Cas. Abr. 636; Atlantic Ins. Co. v. Lunar, 1 Sand. Ch. 91; Bunyon, 93. The case in Vernon shows that a judgment had been obtained at law, but its collection was enjoined.

[2] Home Ins. Co. v. Stanchfield, U. S. Circuit Court, District of Minnesota, 2 Abb. C. C. 1. Dillon, J., in his opinion, which examines all the cases, says: "In the case before us, no reason is set forth in the bill showing that the insurance company needs the aid of a court of equity to relieve itself of liability on the policy. Before the bill was filed the loss had happened. By the terms of the policy the assured is bound to sue within a year, or be forever barred. The bill alleges that he is about to bring an action on the policy. If the facts averred in the bill are true, they constitute a complete defence to such an action, and nothing is set forth showing that any obstacles stand in the way of making this defence at law. If no loss had happened, and especially if the policy were one having many years to run, such as life policies, there would seem to be a necessity to sustain a resort to equity to cancel the contract, where it had been procured by fraud. But such is not the case now before the court. There are, however, other and perhaps more satisfactory grounds for not entertaining the present bill. The bill is one to have a contract made between the parties decreed to be delivered up to be cancelled. This cannot be done without wholly taking the matter out of the law courts, and cutting off all action in those courts. If this bill is not sustained, the parties are simply left to their legal rights and remedies. If no hardship, no injustice, will result, and no necessity appears for not leaving the parties to their rights and remedies at law, equity will leave them there. Now, it is well settled, to use the language of Mr. Justice Story, that an application to equity, to have 'instruments cancelled or delivered up, is not, strictly speaking, a matter of right, * * * but of sound discretion, to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case.' * * * * Applying these principles to the present case, we do not deny that equity has jurisdiction, by reason of the fraud alleged, to entertain the suit, but are of opinion that it is inexpedient to exercise it under the case made by the bill. To leave the parties to their remedy at law seems to be a more reasonable and proper exercise of the discretion which the court has in bills to cancel contracts, than to retain the bill and exercise the authority asked. Because, 1. The company has a full, plain, and perfect defence to the policy at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper. 2. Action at law on the policy must (as we have seen) be brought in a short, limited time after the loss. In the present case, only about seven months remained to the assured, and the bill alleges that he was about to bring suit; the purpose of the present bill is, therefore, manifest, viz., to force the assured to litigate in equity instead of at law; thereby depriving the party of the right to a trial by jury. 3. If the bill be entertained because the insurance company has the right to resort to equity, then all similar bills must likewise be entertained in equity, and this gives the companies the advantage of a choice of forum. If the company prefers to litigate in equity, it will file its bill before the preliminary proofs are furnished, and thus compel the assured to settle the controversy in that court. If, on the other hand, the company prefers to litigate at law, it will simply omit to file a bill, and await the action of the assured, who, unless there is some special ground for going into equity, must be content with his legal remedies. 4. The effect of sustaining the present resort

and, therefore, if such a bill is filed, after a loss has occurred, to procure a decree, cancelling the policy on the ground of fraud in obtaining it, as the fraud could be interposed as a defence, and the company is protected against unreasonable delay in bringing the action by a clause in the policy, the bill will be dismissed.

§ 178. **Non-Payment of Premium.**—As a general rule, a breach of any of the conditions of the policy terminates the contract. Those conditions will be fully stated in the next chapter. It is, however, convenient to consider here the condition requiring a prompt payment of the premiums, a breach of which most frequently leads to a termination of the contract. The American policies, almost without exception, require the payment of the premium punctually on the day named in them, and if it is not so paid, the policy is declared to be forfeited. After that time, however, the companies will ordinarily, as a favor, and not a right, renew the policy, if the insured, on a new examination, is found to be in good health. The English companies, on the other hand, allow a period of grace after the day named in the policy and do not forfeit the policy if payment is made within the extended time. The competition for business in this country has led, recently, in some cases, to the introduction of the English custom, but it

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to equity, would be to transfer the great bulk of all litigation arising out of losses under policies, from the courts of law into the courts of equity. The business of insurance is now almost wholly carried on by companies of large capital, and these are in most instances foreign corporations. From the supposed sympathy of jurors in favor of the assured as against the insurance company, and from the supposed even-handed impartiality of the judge, it is not difficult to see that companies, having the choice of courts, would prefer the equitable to the legal forum in almost all cases." Miller, J., "I think the turning points of the case are, that the loss had occurred before the bill was filed, and that by reason of the limitation in the policy as to the time of bringing suit, and the allegation that the defendants were threatening to sue at law, there is no danger of indefinite delay, nor is there any other circumstance alleged warranting a resort to equity. In case such a bill were filed before loss, or, in the case of a life policy, before death, I am strongly inclined to believe it should be sustained." To same effect, Phœnix Mut. L. Ins. Co. v. Bailey, 1 Ins. Law Jour. 658; Hoare v. Bremridge, 27 Law Times, N. S. 368, 593; where the bill was filed after the death and before the loss became payable, and when the time of payment arrived an action at law was commenced. It refers to a case, however, where the action at law was commenced before the bill was filed.

is of no practical utility, and gives room for the raising of embarrassing legal questions, which had better be avoided.[1]

§ 179. **When Premium Becomes Due.**—While there is no doubt that a failure to pay the premium promptly, on the day required, forfeits the policy if there is a provision to that effect in it,[2] and that the company need not prove demand of payment,[3] various questions of interest have arisen either upon the peculiar wording of certain policies or upon the special circumstances of particular cases. Whatever the company accepts as payment is such, whether it is cash, notes, depreciated currency, goods or services. It is sometimes difficult to decide when a premium becomes due. In Campbell v. International Life Assurance Society,[4] the policies provided that they "will not be considered in force if the premium

[1] It has been suggested (Bunyon, 16), that as in case of the death of the insured, during the days of grace, his representatives may be ignorant of the necessity of paying the premium, and, perhaps, even of the existence of the policy, the company should be required in the event of death occurring during such period, to set off the premium, if unpaid, against the sum insured. But the same reason would apply in the case of a person struck down at, or about, the time when the premium was due, where no days of grace are allowed, as in Howell v. Knickerbocker L. Insurance Company, *post.*

[2] Catoir v. Am. L. Ins. & Trust Co. 33 N. J. 487; Robert v. N. E. Mut. L. Ins. Co. 1 Disney, 355; s. c. 2 Disney, 106; Thompson v. St. Louis Mut. L. Ins. Co. 52 Mo. 469; s. c. 2 Ins. Law Jour. 422; Williams v. Wash. L. Ins. Co. 1 Ins. Law Jour. 422, Iowa; Windus v. Tredegar, 15 L. T. N. S. 108; Bergson v. Builders' (F.) Ins. Co. 38 Cal. 541. In Woodfin v. Asheville Mut. Ins. Co. 6 Jones' Law, 558, there was a policy under which it was held that a failure to pay the annual premium did not work a forfeiture, the insurance having been absolute for five years, and not conditional upon the payment of the annual premiums. In a case in New Jersey, Hillyard v. Mut. Ben. L. Ins. Co. 25 N. J. Law, 415; s. c. 2 Ins. Law Jour. 137, the court seem to hold that a failure to pay the premiums on the day fixed may be excused, if the failure occurred through no fault of the insured, but by the act of law or the act of God. The court say, "It is very unreasonable to infer that it was the intention that a forfeiture should be incurred if the insured, by no fault of his, but from the intervention of the law, failed to fulfill his contract, with respect to punctuality of payment. According to the view of the defendants, and regarding this stipulation as unqualified, if the insured, on one of the days for annual payment, being on his way to settle the premium, had been taken with a sudden sickness, and had remained in a state of insensibility until the time for payment had passed, all his interest in that policy would have been irretrievably forfeited. So unreasonable a force should not be given to this provision. * * The true meaning of the agreement, read in the light of its necessary implications, is that the premium was to be paid at the times specified, unless prevented by the act of God or of the law." This doctrine receives no support from any decided case.

[3] Williams v. Wash. L. Ins. Co. 1 Ins. Law Jour. 422.

[4] 4 Bosw. 298.

remain unpaid beyond thirty days after becoming due, but on satisfactory proof to the directors that the party or parties assured continue in good health, the policy may be renewed at any period within twelve months on payment of a fine." On the margin was entered "premium paid on the 31st day of May, 1850," "risk commencing 29th of May, 1850, ending 28th of May, 1851." The premiums were paid annually in advance as required until the year beginning May 29, 1857. In April, preceding the latter date, a notice was given that the premium was due on May 29, and "unless the same be paid * * on or before thirty days from that date, the policy will become void." On Monday, June 29, about noon, a tender was made of the premium, but the company refused to receive it, alleging that the time had expired, though they offered to renew the policy on proof of good health, which was declined, as the assured was in poor health. Saturday, June 27, was the thirtieth day in numerical order from May 28, Sunday, June 28, being the thirtieth day from May 29. The assured died August 28, 1857, the premium for that year not having been actually paid. It was held that the tender made, on June 29, was in time, for the reason that Sunday, June 28, was the last day, but as the last day came on Sunday the assured had till the next day in which to pay. It was, therefore, decided that the tender made, on June 29, kept the policy in force during that year. The court say, "By one clause of the policy, it is provided that the yearly premium for such assurance is $65.40, and that the said Daniel Campbell hath paid the sum of $65.40, being the annual premium for such insurance, to wit, for the term of twelve months, ending the 28th day of May, 1851. In the margin of the policy are these words: 'Risk commencing 29th of May, 1850, ending 28th of May, 1851.' Thus twelve months is computed as beginning on the 29th, and terminating with the end of the 28th of May. Treating, then, the time for payment of the premium as exactly commensurate with the duration of the risk, if a premium was paid on the 29th, the risk endured until the last

moment of midnight of the 28th of the same month, in the ensuing year, and the new premium ought to be paid before the end of the last moment of the 28th. But then is added this provision: 'The policy will not be considered in force if the premium remains unpaid beyond thirty days after becoming due.' We may properly say, conversely, that the policy shall remain in force if the premium is paid within thirty days after becoming due. Upon these terms used by the parties, the premium, undoubtedly, became due at the end of the 28th of May. The first day of the thirty days for making the payment commenced with the first moment of the 29th of May, and ended with the last moment of the 27th of June. In the year 1857, this fell on Saturday; and in this view, the full thirty days allowed for the payment expired with the end of Saturday. That was the last day for performance of the engagement, and the tender on Monday could not be good. This computation, it will be noticed, includes both the 29th of May and the 27th of June. The day when the premium became due was the 28th of May, and that is excluded. There is no rule which would also exclude the 27th of June. * * There is no way of regarding the question, if we treat the premium to have been due on the 28th of May, which will not make the thirty days end on Saturday, the 27th of June. We are then to consider the point, whether there is not enough in the case to warrant the conclusion that the 29th of May was, by consent, the true day for payment of the premium. The policy was dated the 29th of May. The first premium was paid on the 31st of that month, and the premium was paid annually in advance up to the 29th of May, 1857. The general agents informed the party that the premium would be payable on the 29th of May, by the note stated in the case. This note appears to have been conformable to the understanding and practice of the parties. Again, the note of the general agents was sufficient to justify the assured in treating the 29th as the time when the premium was payable. It was their construction of the effect of the agreement, or of the

habit under it, if it was not fully within their authority to vary the day. It justified the party in relying upon that representation, coming from those who were entitled to make a contract of insurance, and acting as the general agents in the United States. * * I think we are justified in saying that the 29th of May was the true day for payment of the premium, in 1857. If this conclusion is right, the next inquiry is, can the 29th of May be excluded from the computation of the thirty days? If it may be, then the thirty days expired on Sunday, the 28th of June; and the remaining question will be, had the assured the ensuing Monday on which to pay the premium? * * The contract as we now analyze and construe it, was, that the policy should cease to be in force if the premium remained unpaid beyond thirty days after the 29th of May. Then arises the important question. As by this mode of computation the last day of the thirty days was Sunday, could the tender of the premium be made on Monday? The argument which is used to prove that it cannot be is substantially this: 1st. Whatever may be lawfully done on any other day of the week, may be done on Sunday, except so far as positive statutory regulations have prohibited a particular act. And next: What is so permitted to be done on Sunday, must be done on that day whenever, under a contract, the day for fulfillment falls upon it, or else it must be done before that day. I state this to be the substance of the argument as a general proposition; not that it is calculated that such a rule is absolutely exceptionless." After a review of the decisions with reference to Sunday, the court continue: "Yielding to the force of what has been actually decided, we cannot but notice a marked line of distinction between what is suffered being not positively prohibited, and what is allowed to be omitted and deferred, because at variance with the principles and law of Scripture, because as much within the object of the statute, 'the observance of Sunday,' as anything expressly prohibited, and because in some cases it is clear, and in others may be inferred, that contracts are made into which the law imports

the qualification, and the parties are treated as entering into them with that in view, that if the day of performance is Sunday, it may be done on some other day. * * It appears to me, from this review of the law, that the court is warranted in saying that when, from accident or mutual error, the day of fulfilling an agreement falls upon Sunday, there is enough of principle and authority to justify the party in deferring his performance to the Monday ensuing, without impairing a right, or incurring a forfeiture."

Where the policy required payment of the premium annually upon March 5, but thirty days of grace were allowed on condition that no premium should be received after that day unless the insured should be in perfect health, and that the continuance of the risk should be at the entire option of the company, it was held[1] that the policy expired on the failure to pay the premium düe on March 5, 1871, that the days of grace terminated on April 4, and that had the insured died on April 4, and the premium been tendered on that day, the company would not have been bound to accept it.

§ 180. Where the policy provided that the insured agreed to pay into the treasury of the association one dollar and twenty-five cents upon the death of any member, within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans in English, German, and one in French for five consecutive days, it was held[2] that under this clause the assured was allowed the entire thirty days, commencing and counting from, and after the last of the five days of publication; that the company could not claim the forfeiture of the policy on that account until thirty days after the last of the five days of publication had expired. The court say, "The case turns upon the solution of the question, From what day does the thirty days begin to run? If the thirty

[1] Donnald v. Piedmont & Arlington L. Ins. Co. 2 Ins. Law Jour. 738, South Car.
[2] Wetmore v. Mut. Aid & Ben. L. Ins. Ass. 23 La. Ann. 770.

days begin to run from the first day of publication, the time had elapsed before Wetmore's decease. If the commencement be on the last day of publication, the full period of thirty days did not elapse until after his death. If the time begin to run from the first day of publication, why should the publication be required to be made for five days consecutively? The reason for requiring five days' publication would seem to be that this repetition of the publication for five days would be more likely to bring to parties interested knowledge of the event published than a single insertion in the gazette. Taking, then, this construction of the clause stipulating the condition as correct, the publication five times is to be considered the notice, and to be deemed equivalent to notice served personally. Therefore, the last day of publication, and not the first, is the period from which the thirty days begin to run."

The policy in a recent case provided that, "Within each calendar month the insured shall also pay as a mortuary assessment, the further sum of two dollars," &c.; and the company, on one of its customary printed blank forms of receipts and notices of mortuary assessments, gave, on April 13, its receipt for an assessment for March, and, annexed thereto, this notice of the assessment for April: "Mortuary assessment No. 30 will be due and payable on or before the 1st day of May, 1872." Without that assessment having been paid, the insured died on the night of May 1st, 1872, before midnight. The court held[1] that the policy continued until midnight of May 1st, and the insurer was liable. Plaintiff contended he had the whole of the first day of May, until the last moment before midnight, to pay the two dollars, the mortuary assessment for the month of April, and as the death occurred before midnight, he was not bound to pay it. The defendants contended that the mortuary assessment should have been paid within the calendar month of April, according to the express terms of the policy. The defendants contended it was due and payable within the "cal-

[1] Och v. Homestead Bank & L. Ins. Co. 4 Pittsburg Leg. Jour. 98.

endar month" of April, and that the notice for May 1, was merely granting a day of grace to the insured, and not having been paid at all, they had a right to insist upon the forfeiture of the policy. The court say: "The condition of the policy was that, 'Within each calendar month, she (the insured) shall also pay as a mortuary assessment, the further sum of two dollars, &c.' It does not say that the mortuary assessments of each month shall be paid within that calendar month; but that 'within each calendar month,' '*a* mortuary assessment' shall be paid. Neither do the receipts or notices indicate for what month they are given, except by their numbers and dates. The policy simply required the insured to pay two dollars each month. In this case the insured has been in the habit of paying on the first day of each month. All the notices she received were for that day. She paid her two dollars on the 13th of April, when she got notice to pay another on or before the 1st day of May. There was nothing, therefore, in the policy or in the notice she received to make her believe that this assessment was due before the 1st of May, and if not paid before that day her policy would be forfeited. On the contrary, she was justified in believing it was not really due until the first day of May, although she might pay it before that day. As the policy was not definite or entirely clear as to the time when each monthly assessment should be paid, the company had a right to fix a day for its payment. No doubt they could have fixed the last day of the month. They did not do so, however, but fixed the first day of the next month. They established this rule, and by doing so put that construction upon their policy. The insured would so understand it as clearly as they had a right to do. Under this construction of the policy and the established custom of the company, the monthly assessment of April was not due or demandable until the first day of May.

"But if the policy is to be construed more strictly, and to be held as requiring the mortuary assessment for April, to be paid within that 'calendar month,' are they not estopped

by their custom and the notice in this case? The provision for a forfeiture was solely for the benefit of the company. They had a right to waive it. They did so by frequently receiving payment after the first day of the month. The last assessment on this policy, due on the first of April, was not paid till the 13th. By giving out their notices for the first day of the month (and this was the invariable rule—for the notices were so printed), they waived the payment 'within the calendar month,' to all the members of the company, and appointed the first day of the next month for payment. Every insured person would so understand it, and would feel perfectly safe in delaying payment to the day named. It would be regarded as a mutual understanding or agreement between the company and the insured that the first day of the succeeding month should be substituted for the last day of the month for paying the monthly assessments; and as a matter of course the policy would continue that day without being liable to forfeiture. * * But it is contended by the defendants that, even if the assured in this case had until May 1st, to pay this assessment, it should have been paid within the business hours of that day; not being paid or any tender made within those hours, the policy was forfeited before the death, which must have occurred between 11½ and 12 o'clock of that night. The true question however is, when would the policy expire, or be forfeited for the non-payment of the assessment? Would it expire or be forfeited at the close of business hours, or continue the whole of that day, that is until midnight? Ordinarily life insurance policies provide that they shall extend to a day named at noon, when if the premium be not paid, they shall expire or be forfeited. There is no such provision in this policy, and no hour named for the payment of the assessments. In the absence of any such provision, the insured had the whole of the day in which to make payment, and the policy would not be forfeited for non-payment until the whole day had expired, or until after midnight. She died according to the

verdict of the jury, before midnight, and consequently before the policy had become forfeited."[1]

§ 181. In a case in Connecticut,[2] a question arose as to whether the renewal premium had, in fact, been paid, or its payment had been waived. A person, who had been for many years the local agent of a company, had a policy in it on his own life, in the name, and for the benefit, of his wife. The company placed in his hands renewal certificates, to be used in receiving payment of premiums upon policies held in his vicinity, all of which contained a provision that they should not be valid till the premium was paid, and the receipt countersigned by the agent. On paying the premium on his own policy, in 1866, he took such a receipt, but did not countersign it. He died, in 1867, and after his death a similar receipt for the premium of 1867 was found among his papers, not countersigned by him. On this state of facts, it was held, by an equally divided court, that it was not erroneous to charge the jury that the receipt was *prima facie* evidence of the payment of the premium. The court say:

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[1] In Sheridan v. Phœnix Life Assurance Co. 1 E. B. & E. 156, there was presented a "strangely framed life policy," in which "the company have engrafted some new terms upon the old form, without making all the alterations necessary to render the policy consistent and intelligible. The policy, which was dated Aug. 2, 1856, recited that the plaintiff had paid a sum as premium to Nov. 2, and provided that if the insured died, before the termination of twelve months from the date, or should live beyond such period, and the plaintiff should on or before that period, or on or before the expiration of every succeeding twelve calendar months, provided the insured be still living, pay the annual amount of premium, the defendants would pay £1,000, provided that if the insured died before the whole of said quarterly premium became payable in the year in which he died, the company could deduct the premium for the year from the insurance money. The insured died within twelve calendar months, and at the time of his death the third quarterly payment was due and unpaid. The Court of Queen's Bench held that the policy was "to be construed as a policy from quarter to quarter, leaving the assured at liberty to drop it at the end of any quarter, and not imposing any continuing liability on the insurance company, unless the quarterly payment is made at the end of the quarter." The Exchequer Chamber reversed this decision, 1 E. B. & E. 160, holding that the policy being from year to year, and not from quarter to quarter, payment of the instalment at the quarter was not a condition precedent to the continuance of the policy for the current year, and that therefore the company was liable. But the House of Lords in turn reversed the decision of the Exchequer Chamber, and affirmed that of the Queen's Bench. 8 H. of Ld.'s Cas. 745.

[2] Norton v. Phœnix Mut. L. Ins. Co. 36 Conn. 503.

"If Seth P. Norton had been the payee of this policy, and had not been the agent of the defendants, and that [as to non-payment] had been the only condition attached, it clearly would not have rebutted the presumption of payment of the premium. It is not to be supposed, that the officers of this company would send to a policy holder a certificate of renewal, with such a condition annexed, unless the premium was paid, or some agreement of waiver, or for giving time, had been made. In reference to such a certificate in possession of a policy holder, the reasonable presumption, therefore, would be, that the company prepared their certificates in blank, in that way, to avoid the danger of having them obtained surreptitiously, and to enable them to make defence in case of loss, where the certificate was delivered, pursuant to some special agreement which had not been performed. And, under the circumstances of this case, that condition can have no greater effect in this certificate. Although Elizabeth Norton was the payee named in the policy, the notice and the undisputed evidence show that it was, in substance, and effect, a contract between Seth P. Norton and the defendants. It was the common case of a husband insuring his life, in the name of his wife, to make provision for his family, and must have been so understood by the company. That condition, therefore, should not, as I think, be permitted to operate to rebut the presumption of payment arising from the renewal clause.

"The remaining condition is, that the certificate should be countersigned by Seth P. Norton, *as agent.* It seems perfectly obvious, that such countersigning could not have been in the contemplation of the parties. In relation to it Norton was, and must have been, understood to be a principal and not an agent. As he was to pay the premiums, and was to retain the certificate, it was of no possible importance to either party that he should sign it. The evidence shows that he was not the agent of the plaintiff in the transaction. Although the policy was in her name, she was a mere payee, and the company did not expect him to collect the money of

his wife, as *their agent*, and countersign, and leave the certificate with her, as in ordinary cases of insurance, obtained and renewed by agents. Such expectation would be as unnatural as in a case where the policy is made payable to a third person, as security merely, and the company know it; and such policies are very common. The truth, evidently, is, that the blank certificates of the company were prepared in this way, to be used by the local agents where they furnished policies to third persons, and one of them was used in this case, but without intending that it should operate otherwise than as an unqualified renewal. And this view is confirmed by the course of dealing between the parties. The premium, it appears, was paid in 1866, and a like certificate given. * * There is evidence tending to prove a waiver. The policy was of a peculiar character, and had a market value of about $800, because, by its terms, it could be surrendered to the company, and that sum obtained from them for it. There was a like certificate, issued to Norton in 1866, when it is admitted that the premium was paid, and that certificate embraced another policy also, and was not countersigned. Norton had been many years employed by the defendants as a local agent, and was such at his death, and we must presume that he understood his business, that he was in frequent communication with the defendants, and that he would not have neglected to countersign both those certificates, if there had not been some understanding that the condition was not to be operative, and was waived. Norton is dead, and the company, mistakenly, as we think, under the circumstances, plant themselves on a sheer technicality, and explain nothing."

The dissenting judges held that the certificate, *prima facie*, at least, showed that the premium had not been paid; that the portion of the certificate, prepared for the receipt, was left in blank, not signed by Norton, the agent, and moreover, that he, as agent, could not countersign the receipt on his own policy, and that the production of the single prior receipt, not countersigned, did not prove a course of dealing.[1]

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[1] See *ante*, § 170.

§ 182. **Premium Payable in Notes.**—Where, as is very frequently the case in America, a part of the annual premium is paid by a note, and the non-payment of such a note at its maturity, by the terms of the policy, forfeits it, it is held that, if within the year, but after the note becomes due and is not paid, the life terminates, no claim can be maintained against the insurer, as his liability no longer exists. Thus, in a Massachusetts case,[1] the court say: "The policy of the plaintiff's intestate was issued and accepted upon the express condition that it should cease and terminate, in case he should not pay the annual premium on or before the several days mentioned for the payment thereof or should fail to pay when due any notes or other obligations given for premium. Two notes were given for the balance of the premium required to be paid upon the issuing of the policy, one payable on demand for forty dollars, and the other for thirty-three dollars, payable in three, six, and nine months, in equal instalments with interest, to the said insurance company or order, to which last note was added a statement that it was for the balance unpaid of the cash premium on the policy, and was given with the full knowledge and intent that, if not paid when due, without grace, said policy should become absolutely null and void, in accordance with the conditions therein and this agreement. The policy recited, as consideration therefor, the amount of the cash premium in hand paid, and the annual premium of a like sum to be paid in each year during its continuance. The defense rests upon the failure of the plaintiff's intestate to pay the first instalment due on the note above described, by which, it is alleged, the liability upon the policy ceased. * * And we are of opinion that it must prevail. The rights of the plaintiff must be determined by the terms of the contract to which the assured assented, when such terms do not contravene the principles of law or public policy. * * The stipulations in regard to the payment of premium are of the

[1] Pitt v. Berkshire L. Ins. Co. 100 Mass. 500.

substance of the contract, and were made upon adequate consideration. It is urged that the policy acknowledges the payment of the first year's premium, that the condition refers only to future premiums, and that the notes in question are, by the decisions of this court, to be regarded as payment of the balance of the cash premium. But the terms include all notes or obligations given for premium. The note and policy are to be construed together, and the note declares that it is embraced within the conditions of the policy in reference to forfeiture. The acknowledgment of payment in the policy is always open to explanation by proof of the actual facts. The decisions of this court, which declare that the giving of a negotiable promissory note is evidence of payment of a pre-existing debt, allow it always to be shown, to defeat the inference, that such was not the intention of the parties. It only in effect changes the burden of proof in such cases. And here the papers abundantly show that it was not the intention that the notes given should be considered payment of the premium unless paid when due. It is further argued that the note in question is a single, entire contract, and was not due, although the first instalment was not paid as provided. In Vinton v. King,[1] it is held that a note payable by instalments is overdue when the first instalment is overdue and unpaid, so as to effect a subsequent holder with the equities between the original parties. In one sense it is not overdue as to the remaining instalments; but whether, strictly speaking, it is an overdue note or not, it is clearly within the conditions of the policy to be regarded as an overdue obligation given for premium to the extent of the first payment due on the note."

In a similar case in Ohio,[2] the court say: "The conclusion most obviously presented by all the circumstances of the case, and upon a fair construction of the contract is, that there was a giving of credit for a part of the premium. The whole premium was not paid in cash; for one-half of it a

[1] 4 Allen, 562. [2] Robert v. N. E. Mut. L. Ins. Co. 1 Disney, 355; s. c. 2 Disney, 106.

credit was given, and a note taken for the amount. The clause, in express terms, provides that if any note, given to the company for a premium, or a part thereof, shall not be paid, when due, all claim on the policy shall be forfeited to the company, and the policy shall be void. The contingency for which provision was thus made, happened. A note was given for part of the premium; it became due during the life of the assured, and was not paid."

§ 183. **Demand of Payment of Note not necessary.**—In the case last cited it was claimed that, inasmuch as the company retained the note, the policy was not forfeited by its non-payment. It was also claimed that a strict forfeiture should not be enforced. But the court say: "There is, however, to my mind, a still stronger reason why, as to the ordinary annual premium in a life policy, there can be no relief in case of its non-payment on the day specified. The contract is of the description which is termed unilateral. To have it continue from year to year is in the nature of a privilege, secured by the agreement of the company. It may be waived or abandoned by the party, and the company has no right to thrust it upon him without his consent, expressed in the mode and at the time appointed, and the very nature of the business of the company requires that they should know, at the time, whether their agreement is to continue. The principle upon which relief has been refused, in the case of a privilege of purchase, fully applies. It remains, in the next place, to consider whether the condition in the policy, as to a premium note, stands on the same footing as that in relation to the annual premium; and it is upon this point of the case alone, as to which I have found it difficult to come to an entirely satisfactory conclusion. On the one hand, there are conclusive considerations applying to the annual premium, which do not apply to the premium note, particularly that just mentioned, the want of any mutuality of contract, in the one case, and its apparent existence in the other. On the other hand, the well-understood condition

that the prompt payment of premiums was necessary to continue the existence of the policy, and the reasonable conclusion that it was the intent of the parties, as expressed in the clause as to credit, only to waive partially and temporarily this payment, retaining in full force the condition; in other words, providing in such a case as the present, substantially though not in form, for semi-annual premiums. I have considered several collateral questions as tending to throw light on the principal one, and among others, whether, on the non-payment of the premium note, the company, had they elected so to do, might have maintained an action for the amount, and so enforced the continuance of the contract until the end of the year. * * The question whether the company was bound to do any act in disaffirmance of the contract, will at last be found to depend on the intention of the parties, as shown by the nature of the agreement, and to resolve itself into the general question under consideration. As a general rule, a condition in a policy not complied with, defeats it, and no act is required on the part of the company. I have found no authority which establishes an exception in the case of a condition as to the non-payment of a premium note. * * * If the breach of such a condition is a good defence at law, the absence of any case in which relief has been given in equity, upon the general ground of the jurisdiction to relieve against forfeitures, is a forcible objection to the propriety of extending that branch of the jurisdiction to such cases. After much reflection on the subject, there are to my mind serious objections to any such relief in this case upon the principles which appear to have been established upon the subject, and which have been before stated. The contract of life insurance is one of a peculiar nature. The company, for example, is called on, in this case, for the consideration of ninety dollars and forty cents, to pay eight thousand dollars. If such demands are enforced, as they undoubtedly may be, when there has been a compliance with the terms of the contract, in what mode is the loss to be made up unless by the receipt of pre-

miums, and the judicious investment and use of the money received? * * I cannot resist the conclusion that the prompt payment of the premium is of the substance of the agreement in a contract of life insurance, and that this principle applies as well to the case of a premium for which, in favor of the assured, a credit has been given, as to any other. Such being the principle applicable to the case, in my opinion there is nothing in the fact of a note being given and being retained by the company, which forbids its application. On the contrary, taking the policy and the note together, as one and the same transaction, which it would still more properly be, had the indorsement been made, I think it might be very fairly claimed that, upon the non-payment of the note, being for a definite part of the current annual premium, and the consideration, by the terms of the agreement, ceasing, the company could not have enforced its payment. It has not escaped my observation that the note is made payable to order; but it could not be negotiated, and there could have been no intention that it should be negotiated, so as to be clear of the condition in the policy upon which its consideration depended; for that consideration, and its connection with the particular policy, is clearly shown on the face of the note, and it could not be taken without full notice. The fact that this statement appears on the note, and that there was, or should have been, an indorsement of the receipt of the note upon the policy is, as has been before suggested, strongly significant to show that it was the intention of the parties to carry out, in substance, the proposition which, in fact, appears to have been made, that a semi-annual premium should be paid."

Where, however, the policy contained the ordinary provision, that it was to be forfeited unless the premiums were punctually paid, and two annual premiums were paid, a credit being however given for part of each, and when the third premium became due one half of the cash due was paid to the agent in cash, and he took a note for the other half which stipulated that if it was not paid at maturity, the policy was

to be void, the court held,[1] that as the note called for interest at seven per cent., while the interest referred to in the policy was six, it was not taken in pursuance of the requirements of the policy, and that therefore, unless demanded on the day of actual maturity, a failure to pay it did not forfeit the policy. The note was demanded at various times, but not on the day of maturity. It was retained, but the company refused to accept payment of the next premium. The court say, "Let us then inquire whether the note given in this case could have been sued upon and recovered by the company after it became due, or whether the maker could have successfully defended against it on the ground that he had elected to insure no longer with the company. We think he could not. The risk for the whole year would have commenced; the policy for that year would have attached, and the company would have carried it six months and three days, liable, in case of the insurer's death, during the whole time. The payment of the note became a condition subsequent, which only the company could avail itself of. There would have been an election on the part of the insured to insure for another year, and not a refusal to do so, as if he had not attempted to pay the premium for the year, in which case there would have been no liability on his part. Such terms in the note made the policy merely voidable at the option of the company. * * The company might have forfeited the policy on non-payment of the note when it became due; but it should have exercised the right promptly. It should have demanded payment on the last day of grace during the business hours of the day; and if such payment was not then made, it should have declared the policy forfeited or void. This is in accordance with well settled rules for enforcing forfeitures for breaches of conditions subsequent. * * The company then did not determine or make void this policy when the note fell due, and it became a mere debt, like the check given for the other half of that year's cash premium."

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[1] Mut. Ben. L. Ins. Co. v. French, 2 Cincin. 321.

§ 184. **Return of Note not Necessary.**—In a recent case,[1] the premium was payable on the 11th of December in each year, and there was a provision that a failure to pay any note given for premium should render the policy void without notice. The second annual premium was paid, in part, by a note dated December 11th, 1869, payable four months after date without grace, and containing a stipulation that if not paid at maturity the policy should be void. No tender of payment of the note was made until the 12th of April, 1870, when the defendants refused payment, claiming that the policy had lapsed by reason of the non-payment of the note at maturity. The theory upon which the plaintiff's counsel sought to maintain an action against the company was, that the policy could not be terminated without a demand of payment of the note, and that even if it could be, the tender of payment was in time. At the trial the court held in favor of the defendants, basing its decision on Roberts v. New England Life Insurance Company,[2] and on appeal to the general term the decision was affirmed. The opinion of Daly, J., at the trial, says: "The instrument which the plaintiff's husband signed in this case, was a promissory note, having all the distinguishing attributes. It was for the payment of a certain sum of money, absolutely, and at all events upon a certain day. It did not depend upon any contingency, and was not payable out, or from any particular fund. As a promissory note, therefore, it was for the plaintiff's husband to pay it, on or before the day named, and not for the defendants, who were the payees, to demand it. A consequence was attached to his failure to pay it upon the day named, which was expressed both in the note and in the policy of insurance, which was, that the failure to pay the note at maturity, should cause the policy to be void, without notice to any party or parties interested therein. He did not pay it upon the day it was due, but the amount was tendered to the defendants upon the day following, when they refused to

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[1] Roehner v. Knickerbocker L. Ins. Co. 4 Daly, 512.

[2] 1 Disney, 355; s. c. 2 Disney, 106.

receive it, regarding the contract as at an end, according to the condition. This is not an action to relieve against a forfeiture, even if the condition were one against the strict enforcement of which a court of equity would relieve, which is by no means clear. It is an action to recover upon the policy, upon the assumption that the condition was fulfilled by a tender of the money in time. It is claimed that the note was not payable until the twelfth; but this is erroneous. It was payable on the eleventh. * * The parties have expressly agreed that the failure to pay the note on the day it is due, should make the policy void without notice, and the court cannot, by construction, make a different contract from what the parties themselves have made. By the terms of their agreement the policy had become void on the twelfth, the day when the plaintiff's husband went to the defendants and tendered the amount of the note, and I utterly fail to see upon what ground or principle I could hold that the condition was fulfilled by a tender of the amount of the note on that day.

"It is claimed that the defendants cannot treat the policy as void, until they have returned the annual premium note of $212, and the four months' note for $120.84. The defendants were to retain the annual premium note, as well as the other note, until the day fixed for the payment of the latter, and therefore, before they could return either, the breach of the condition occurred by which the policy became void. They are bound, of course, to return these notes when requested, but that is all the obligation on their part that can arise respecting these instruments, and in this case they have returned them by surrendering them up on the trial. What the effect upon their contract might have been if they had indorsed these notes over, so as to give a third person a right of action upon them, it is unnecessary to consider, as the defendants have not done so. They have brought them into court, and the plaintiff is entitled to the possession of them. * * I was disposed, if possible, to regard the agreement to dispense with notice, as meaning notice of an election

on the part of the defendants that the policy should thereafter be void, and in that sense distinguishable from a demand; but upon reflection, I do not think that I can so limit it, for were I to hold that a demand was necessary, it would be holding in reality that notice was required to render the policy void, for no demand of the note being necessary to charge the maker, the demand could only, in legal effect, operate as a notice that if the money was not paid when demanded, the policy would be void. It would in fact be refusing to give effect to the very agreement which the parties had made."

§ 185. Where the policy provided, that it should be suspended, if a note was not paid when due, and should remain suspended till the note was paid, and a loss occurred while a note remained so unpaid, it was held[1] that the company was not liable, and that an agreement, that the note might lie over for a few days, did not waive the forfeiture nor restore the right of action.

§ 186. **Provision as to Forfeiture strictly Construed.**—But the provision forfeiting the policy in case of the non-payment of a note must be clear and distinct. Thus, where the policy was expressed to be made in consideration of a premium already paid, and of future annual payments, with a condition that, in case any premium due on the policy should not be paid when due, the policy should be forfeited; and declaring that the policy, and any sums that should become due thereon from the insurers, were pledged to secure the payment of any premium on which credit should have been given, or any note or security therefor, such pledge, in no respect, to affect the provisions respecting forfeiture; and, further, declaring that the policy should not take effect until the first premium was paid; it appeared that the policy was delivered, and the company received a portion of the first premium, in cash, and two notes, payable, one in six months,

[1] Wall v. Home (M.) Ins. Co. 36 N. Y. 157; Williams v. Albany (F.) Ins. Co. 1 Mich. Nisi Prius, X.

and the other on demand after five years. The latter note contained a provision, that the policy should be subject to forfeiture, in case of the non-payment of the interest and principal of the note. The first note, however, had no such provision, and at maturity it was not paid. The policy did not contain any clause, forfeiting the policy in case any note given for a premium was not paid. It was held,[1] that the policy had taken effect; that the clause, as to forfeiture for non-payment of premiums, related only to premiums other than the first one; that the policy was not forfeited by the non-payment of the note, and that the fact that the assured, on the maturity of the note, had expressly refused to pay it, saying he "would not have anything more to do with the company and abandoned the whole thing," made no difference, the policy having been retained by the assured, and the note by the company, and there being no evidence that the company assented to the abandonment.

In a very recent case in Indiana,[2] the facts were similar to those in that just stated. A foreign life insurance company, through its local agent, issued a policy which stated, that "in consideration of a certain sum to them paid by"—a person named—"being the assured in this policy, and of a like sum to be paid to them by said assured, on or before the 12th of March, in every year, during the continuance of this policy," the company insured his life, in a certain amount, for the term of his life; that, "in case of the forfeiture of this policy, the insured shall not be entitled to any return of premium, or share of the surplus funds;" that, "in case any premium on this policy shall not be paid at the day when payable, the policy shall thereupon become forfeited and void;" that "this policy and any sums that shall become due thereon from said company are pledged and hypothecated to said company, and they have a lien thereon to secure the payment of any premium on which

[1] McAllister v. N. E. Mut. L. Ins. Co. 101 Mass. 558.
[2] N. E. Mut. L. Ins. Co. v. Hasbrook, 32 Ind. 447.

credit may be given, and of any note or security therefor: but this pledge and hypothecation shall, in no respect, affect the provisions respecting the forfeiture of this policy." The agent took, for the first year's premium, goods to the amount of one-fourth thereof, a note for the same amount, due in six months, and a note for the remaining half, due in five years, both notes payable to the company, and bearing interest from date, the interest on the latter payable annually. The latter note provided, that it was embraced in said condition of forfeiture, but the former note did not contain such a provision. The agent remitted to the company the amount paid in cash, less his commission, together with the notes. The six months' note was returned to the agent for collection, before it became due, and was not paid at maturity. The policy was dated March 12th, the insured died in October of the same year, and suit was brought by the administrator of the estate of the assured upon the policy. Rules of the company were proved, as follows: "A tariff of premiums shall be fixed by the directors, below which no risk shall be taken; but the president shall, in doubtful cases, consult the committee of finance or any two of the directors, on any advance for particular risks. The premiums shall be paid, in conformity to the rules of the company, before the policy is issued, and the president and secretary shall each be liable for the amount of premium on policies delivered at the office of the company. A part of any annual premium may be taken in one or more promissory notes, on interest, secured by the condition in the policy; but every such note shall be made payable, before or at the beginning of the period of the risk for which the note is given, so that the company shall not run the risk for any time for which the premium shall not have been actually paid." This rule was not a part of the contract, but the assured had notice of it. On this state of facts, it was held that the six months' note was not within the condition of forfeiture in the policy, and that its non-payment at maturity did not, therefore, avoid the policy. It was also held, that the company was liable to pay the sum insured, after deduct-

ing therefrom the amount of the two notes. The court says: "By the policy, the first year's premium is treated as paid. It is very clear that, aside from the two notes, the condition of forfeiture, by its terms, applies only to the premiums to be paid on the 12th of March, in every year, during the continuance of the policy. It is true, that it may be shown that the first year's premium was not paid, although it contradicts the receipt contained in the face of the policy; but in giving a construction to a contract, the intention of the parties, as expressed therein, must govern. The rule of law, that all the writings executed by the parties at the time form a part of the contract, is recognized. The policy and the notes must be taken as one contract, and construed accordingly. Does the six months' note change the contract as expressed on the face of the policy? It is not the duty of the court to extend the operation of this condition of forfeiture beyond what was in the contemplation of the parties at the time the contract was made. It was thought necessary to specify, in one of the notes, that it was embraced in the condition, but this was omitted in the other. But the mere giving of a promissory note, could not change the terms of the contract of forfeiture, as expressed on the face of the policy. If such had been the intention of the parties, it should have been expressed, either in the policy itself, or in the note."

Where an endowment policy, on which two payments had been made, partly in cash and partly in notes, was surrendered, and a paid-up policy taken in place of it, and the new policy provided that it was conditional upon the interest on two notes given in part payment of the premiums on the surrendered policy being paid in advance, and the notes calling for annual interest, it was held[1] that the policy intended that interest should be paid annually in advance, and that a single payment was not sufficient to prevent forfeiture.

§ 187. In Baker v. Union Life Insurance Co.,[2] the hus-

[1] Patch v. Phœnix Mut. L. Ins. Co. 44 Vt. 481; s. c. 2 Ins. Law Jour. 86.

[2] 6 Rob. 393; s. c. 37 How. 126; 6 Abb. N. S. 144. The statement of the case as here given, is in part prepared from the original papers.

band procured an insurance upon his life for the benefit of his wife, giving his notes for the whole premium, which were receipted for on the policy as cash. He then took the policy to his wife, and there was no evidence that she knew that the premium had not been paid in cash. She expressly swore that she did not know it. One of the notes came due during the husband's life, and was not paid though he repeatedly promised to pay it, and he died leaving it unpaid. On the margin of the policy was an indorsement headed "Special agreement," which provided that the policy was issued and accepted upon the condition that if at any time any note (other than the usual premium note for one-half the annual premium), should be given in payment or part payment of any premium then due or to become due, and the note should not be paid, the policy should become void. The notes contained a similar condition. Upon this state of facts the court below held the company liable. But the Court of Appeals reversed this decision,[1] saying, "The husband agreed for the insurance, and caused his wife to be named as beneficiary. It was, nevertheless, a contract with the husband, and the terms and conditions to which he assented, attach to and qualify the policy, and determine the liability of the insurers. As between the immediate parties to the contract, the acknowledgment of the receipt of the first annual premium embodied in and indorsed on the policy, is but an admission, and liable to be contradicted. It is simply evidence of the fact of payment, but not conclusive. * * In so many words, the parties have agreed that upon failure to pay the notes at maturity, the policy shall become immediately void, and the insurers shall be released from all obligations under it. The contingency has happened, and the result dictated by the contract necessarily follows." The court then expressly approve the decision in Pitt v. Berkshire Life Insurance Company,[2] and continue: "The case will not be changed if the policy is regarded as having been

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[1] 43 N. Y. 283.

[2] 100 Mass. 500.

procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff, and, claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own. If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether; but he cannot affirm in part and repudiate in part, take the benefit of the favorable parts of the contract, and reject the residue. There is no question of estoppel *in pais* in the case; none was found by the jury, and there was no evidence upon which it could have been predicated. There can be no estoppel in behalf of one having full knowledge of all the facts; and as the payment of the premium by a note by conditions affecting the policy, instead of in cash, was the act of the plaintiff's agent, and as the principal is chargeable with knowledge of the act of the agent, and notice to the agent is notice to the principal, it follows that the defendants are not estopped from alleging the truth of the transaction as against the plaintiff. * * Every element of an estoppel is wanting here: the defendants, by their agent or otherwise, made no statement or representation to influence the action of the plaintiff, or which could have been supposed would influence her conduct in any respect, and there was no evidence tending to show that she was influenced by the acknowledgment of the receipt of the premium, or that she could or would have paid the premium at any time, or under any circumstances. Neither was there any waiver of the condition of the policy or the notes. An unsuccessful demand of payment could not be construed into an abandonment and waiver of any of the terms and conditions of the note or policy, or as an alteration of the contract in any particular."

§ 188. **Right to Paid-up Policy.**—Where a policy issued in 1870 provided that the premium was payable annually on

October 15, and that, if, after the first premium was paid, default should be made in the payment of any subsequent ones, "such default shall not work a forfeiture of this policy, but, if it be surrendered within thirty days after the date of such default," the company will issue a paid-up policy for its net value, computed in a manner pointed out; and the only premium paid was for the year ending October 15, 1871, and he died on October 24, 1871, not having paid the second premium, it was held[1] that the company was only liable to pay the amount of the paid-up policy.

Where the policy provided that, even if default should be made after the payment of three annual premiums, the company would pay "as many twentieth parts of the original amount hereby assured, as there have been complete annual premiums paid at the time when such default shall first be made;" and there was annexed to it before delivery the following provision: "In all cases where default shall be made in the payment of any premium upon this policy, the company shall not be held for any sum whatever, unless this policy be returned to the said company for registration and appropriate indorsement within thirty days from the date of such default," it was held[2] that the two clauses must be read together; and that when so read the contract meant that it was to be paid "if returned for indorsement and registration within thirty days of such default;" and unless it was so returned within the time there could be no claim under it.

So, where the policy provided that on failure at any time to pay annual premiums, the company would, "upon a surrender of the original policy within thirty days after such unpaid premium should be due," issue in exchange therefor a paid-up policy for a proportional amount, it was held[3] that in order to entitle the assured to a paid-up policy, the old policy must be actually surrendered within the thirty days, and a failure on the part of the assured to do so forfeited his right.

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[1] Mound City Mut. L. Ins. Co. v. Twining, Supreme Court of Kansas, MSS.
[2] North v. North Am. L. Ins. Co. U. S. Circuit, Cal. 5 Coast. Rev. 93.
[3] Smith v. Continental L. Ins. Co. District Ct. of Phila.

§ 189. **Waiver of Payment.**—A company may, however, waive the prompt payment of the premiums, as they may waive compliance with any other condition, either by express agreement or by their acts. In Bouton v. The American Mutual Life Insurance Co.,[1] a waiver was alleged, and, though the case finally turned upon the question of want of power in the agent, the court express their opinion upon the effect of such a waiver. They say, we "are of the opinion that as the policy provides that in case the annual premium required by it should not be paid in advance as therein mentioned, the defendants should not be liable for the payment of the sum insured or any part thereof, and the policy should cease and determine, it was optional with the defendants, on such non-payment, to consider and treat the policy as being at an end to all intents and purposes, in which case they would be absolved from all claim or liability thereon; but that as that provision was inserted for the sole benefit of the defendants, it was only voidable at their election, and that it was therefore competent for them to waive a strict compliance with it, after the time stipulated for the payment of such premium; and that in case of such waiver, the policy would be revived and continue obligatory on the defendants on its original terms; and further, that the reception by them, or their authorized agent of the premium for that purpose, after that time, would have the effect of reviving and continuing the contract evidenced by the policy as though it had been strictly complied with by the insured."[2]

§ 190. Several decided cases hold that a habit on the part of the company not to require prompt payment of the prior premiums on a particular policy is alone a waiver of the condition as to that policy. But it may be doubted whether this is correct upon principle. A general usage of the company upon all its policies to waive prompt payment, might perhaps properly have this effect, though even that

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[1] 25 Conn. 542. See Bodine v. Exchange F. Ins. Co. 51 N. Y. 117.

[2] Cases of alleged waiver of payment may also be found in the chapters on Agency and Waiver. See, also, *ante*, §§ 161 to 164.

may be well doubted.[1] In one of the cases, however, to which reference has been made, besides the ordinary provision for a prompt payment of the premium, it was provided that a lapsed policy might be renewed at any time, on satisfactory proof of the health of the assured, a re-examination being required if thirty days had elapsed, and six days after a premium was due, it was received without any objection, and without requiring any evidence as to health (it having been the custom of the company so as to receive premiums); the company was held liable, though the assured was sick at the time, and died in a few weeks afterwards.[2] The company claimed that as the policy had lapsed, the plaintiff, on the renewal, was bound to disclose the state of the assured's health, and, not having done so, the policy was void. But the court say, "If the premium in this case had been paid on the 10th of December, the plaintiff was under no obligation to say anything about her husband's health, for whether he was sick or well, she was entitled to insure at the rate specified in the policy. The question, therefore, is, whether the omission to pay the premium for six days after it became due, required any different course of conduct on her part. A very great latitude as to the time of payment, it will be seen, was permitted by the defendants with regard to the former payments, except one. * * The practice of the defendants seemed to be very lax on this subject, and naturally induced the plaintiff to suppose that a literal compliance as to the hour and day of payment would no more be required on this than on the former occasions. They had the right, undoubtedly, at any time to regard this short delay as a deviation from the terms of the contract, and, before they received payment of the premium, to require evidence of the health of the insured; but it may be well doubted whether, in this case, they could enforce that right without notice to the plaintiff, that they intended no longer, unless this evidence should be pro-

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[1] Howell v. Knickerbocker L. Ins. Co. 44 N. Y. 276; Burger v. Farm Mut. (F.) Ins. Co. 3 Pitts. Leg. Jour. 4. See chapter upon Evidence.

[2] Buckbee v. U. S. Ins. Ann. & Trust Co. 18 Barb. 541.

duced, to receive the payment of premiums as heretofore, after they became due. * * It may therefore be well presumed that the delay of payment was not without the concurrence of the defendants. This being the case, there was a waiver of a literal compliance with the terms of the first condition, and in effect the policy did not require renewal, within the meaning of that condition; for in truth it was not lapsed. The precise time, indeed, specified in the contract, had elapsed; but judging from the acts of the parties, commencing with the acceptance of the original application, the policy, strictly speaking, had not lapsed. If this view is correct, it was not necessary to submit any questions to the jury relative to Buckbee's health, for if the conduct of the defendants or their agents amounted to a waiver, and restored the policy to the same condition in which it would have been if the premium had been paid on the very day and hour on which it fell due, all inquiries of this kind were superfluous; if there was no waiver, it is quite clear there could be no renewal, because the plaintiff had it not in her power, pursuant to its first condition, 'to produce satisfactory evidence' as to her husband's health, for he was then, no doubt, far advanced in the disease which soon after caused his death."

To the same effect is a Pennsylvania case,[1] where the court say: "If it was the practice of the company to notify the plaintiff of the times her premiums were due and payable, and omitted on the occasion of the default; or if they so dealt with her as to induce a belief that the clause of forfeiture would not be insisted on in her case, in case of a dereliction of payment at the day, and that it was declared that the only risk she ran in not paying at the precise time, was death occurring in the interval of non-payment of overdue premiums, and this put her off her guard, they ought not to be permitted to take advantage of a default which they may themselves have encouraged. That was an aspect of the case in proof upon which the jury should have been

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[1] Helme v. Phil. L. Ins. Co. 61 Penn. 107.

allowed to pass. In transactions of this nature, it is easy to mislead by a pretence of liberality, if followed by entire strictness in practice; and the only cure for this is the inquiry by the jury whether the party has been misled by the former. If so, it is a fraud upon the parties' rights which ought to be condemned and redressed. In this manner a waiver of strictness may take place, and it is not to be doubted that the company may waive defective compliance with the rules of insurance. * * There must be no cast of management or trickery to entrap the party into a forfeiture."

In a more recent case,[1] the sum insured was to be paid in nine years, or at the death of the insured if that occurred first, and it was provided that if any premium should not be punctually paid, such default should not work a forfeiture of the policy, but that the insurance should be commuted to such proportional part of the whole sum as the sum of the payments made should bear to the amount of the ten annual payments. At the foot of the paper upon which the policy was printed, was the following printed memorandum: "N. B.—Agents of this company are not authorized to grant permits, or to make, alter or discharge contracts, or waive forfeitures. If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments." The assured died before the expiration of the nine years. The evidence showed that the premium due on the 28th of March, 1870, was not paid or tendered on that day, but that in two days thereafter it was duly tendered and refused; that at the time the tender was made there had been no change in the health or condition of the assured; that previous annual premiums upon the policy, commencing in March, 1868, had always been paid by the plaintiff weeks after they became due, and were received by the company

[1] Thompson v. St. Louis Mut. L. Ins. Co. 52 Mo. 469; s. c. 2 Ins. Law Jour. 422.

without objection, and that it had been the practice of the plaintiff to pay the premiums upon another policy in the company, in force during the same time as this policy, long after they became due. There having been a verdict for the plaintiff for the whole sum insured, it was held on appeal that the parties had construed this contract for themselves by their acts, that the stipulation in regard to the time of the payment of the premiums was not regarded by them as of the essence of the contract, and that the memorandum at the foot of the policy did not give any additional force to the stipulation in it. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the assured to disregard the exact day of payment and to rely upon the courtesy of the company.

§ 191. On an application, an agent gave a receipt for a party's premium, dated on June 5, which stated that the policy was to be in force from that date, if the application were accepted by the company, but if it was declined the money was to be returned. On August 2 following, the agent received from the company a policy made out in pursuance of the application, but dated April 5 instead of June 5, and calling for quarterly payments on or before the sixth days of April, July, October, and January, and acknowledging the receipt of the first one. In fact, the first quarter's premium was not paid in cash, but by a note of the applicant payable in sixty days, and maturing on August 4. The policy provided in the usual form that if the premiums were not paid on the specified days, at the home office (unless otherwise expressly agreed in writing), or to agents when they produced receipts signed by the president or secretary, the policy should be forfeited. Attached to it were two regular receipts, duly made and signed by the proper officers in New York, dated at New York, April 6th, and July 6th, respectively, with blanks to be countersigned by the agent for the Pacific Coast, purporting to be for the premiums for the two quarters, commencing at their respective dates. These receipts, upon their arrival at San Francisco, were duly coun-

tersigned by the agent, stamped, and the stamps canceled with the San Francisco office canceling stamp on August 2d. On August 8, the agent's clerk wrote to the assured, saying that his policy had arrived, and asking whether he should send it to him or if he would call and get it when in the city. The receipt of this letter was not expressly shown, but it was produced at the trial by the plaintiff. No notice either of the acceptance of the application or of the issue or arrival of the policy was shown to have been delivered to or received by Young. Nor was any demand made upon him for further payment, nor any receipt or notice requiring payment presented to him, and neither the note, nor any subsequent installment of premium was in fact paid; the note was never surrendered or offered to be surrendered, but it and the receipts were still in the possession of the company at the trial. The insured was shot on August 21, and died on September 20, having been all the time unable to attend to any business. The policy was cancelled by the company on October 31. It was conceded that by the making and forwarding of the policy a contract was constituted, but it was insisted that, although the memorandum of agreement of June 5th did not specify all the terms of the contract, it was implied that the policy should be upon the usual terms embraced in the company's policy; that the acceptance was upon the terms of the policy, as it was actually prepared and executed, and that under these terms the policy became forfeited for non-payment of premiums, as required by one of its express conditions. The defendant claimed also that the note given for the first quarter's premium not having been paid when due, a forfeiture resulted, but that, if this was not so, one certainly resulted from the non-payment of the second quarter's premium, which fell due on July 5, if the date of the policy governed, or on September 5, if the receipt of June 5 were to control.

The court say:[1] "The policy bears date April 5th, and

[1] Young v. Mut. L. Ins. Co. 2 Ins. Law Jour. 289.

the receipts prepared by the company correspond with this date. The company, therefore, regarded the second quarter's premium as due July 6th, and acted upon that idea, although the application was made and the first memorandum receipt and contract given on June 5th. The promissory note given for the first quarter's premium, being payable without grace, fell due August 4th. It will be seen that the condition of the policy imposing a forfeiture, required payment to be made 'at the office of the company in the city of New York, or to agents when they produce receipts signed by the president or secretary, unless otherwise expressly agreed in writing.' There is no evidence in this case of its having been otherwise agreed in writing. It does not appear that the policy was received at the San Francisco office before the 2d of August. At or about the sixth of July the policy must have been in the defendant's office in New York, which would give twenty-seven days to August 2d, to make the passage to San Francisco. The defendant knew at the time of despatching the policy that the second installment of premium had not been paid at the office in New York. It also knew that it could not be paid to its agents here in accordance with the terms of the contract, so as to be obligatory upon defendant, for the reason that the only receipt duly signed as specified in the policy, authorizing the payment to its agents, was attached to the policy, and would not reach San Francisco till the month of August, a month after it was due. The defendant did not expect payment at its office in New York city, or it would not have sent its receipt to its agent to enable him to receive payment. The defendant, then, by its officers in New York, transmitted the policy and receipts, with knowledge that payments had not and would not be made at the office in New York, and that it could not be made elsewhere in the mode required by the terms of the contract for a month after due. Yet the policy was sent with an intent that it should be delivered and payment received by its agent in San Francisco, although it knew that there must necessarily be a forfeiture upon the

strict letter of the contract. Also, after the receipt of the policy at San Francisco, on the second of August, nearly a month after the second installment fell due, according to the terms of the policy, the defendant's agent, necessarily knowing that payment had not been made, stamped and countersigned the receipt ready for delivery upon payment, thereby treating the agreement as still in force. Again, on the eighth of August, four days after the note given for the first quarter's premium fell due, and after default in payment, and necessarily with knowledge of non-payment of both the note and second installment, the agent of the defendant addressed to Young the note before set out in this opinion. This act, after the forfeiture, if any there was, had attached, recognizes the agreement as being still in force. The letter does not even demand payment, or refer to the fact of non-payment, or fix any time when the insured should call for the policy, or make payment. It simply notifies him that his policy has arrived, and asks whether it should be sent to him at Vallejo, or whether he would call and get it when in the city, implying that it would be at his option to have it sent to him at once, or wait his convenience till he should come to the city and be able to call for it. The defendant manifested no haste or anxiety upon the subject, for the policy was on hand from the 2d to the 8th of August at least, before the notice to Young was even written, and it does not appear when it was sent. It does not appear that this or any other notice reached him. No other act of the company is shown inconsistent with this action, or tending in the slightest degree to show an intention to insist upon a forfeiture, till after the death of Young, when the policy was cancelled, October 31st, payment of the loss having before been refused.

"It could hardly have been expected that Young would call to make the second payment until notified whether the risk had been accepted, especially as there was ample time between June 5th, when the application was made, and the 5th of September, the time when the next payment would

have fallen due, had the date of the policy agreed with the date of the application and the preliminary memorandum of agreement given to him by defendant's agent in San Francisco. It was doubtless supposed that notice of acceptance or rejection would be given before the note for the first quarter's premium would fall due. But however this may be, the several acts of the defendant, and all its acts, and the acts of its officers in relation to the matter shown to the court, which were performed subsequent to the accruing of the forfeiture, if any accrued, treat the agreement for insurance as still in force. They affirmatively indicate an intention not to insist upon a forfeiture, and had the accident and death not occurred, there can be no doubt, from the facts shown, that even as late as the death of Young, the premium would have been received and the policy delivered. * * I think, upon the facts, the court must find a waiver of any forfeitures which had accrued, and that under the circumstances, after the death of the assured, it was too late, for the first time, to insist upon the forfeiture."

§ 192. In an unreported case[1] the plaintiff brought his bill in equity under the following circumstances: He took a policy on his wife's life in 1865, it being a five payment policy, under which the annual premiums were payable on Nov. 15. He paid the first four premiums to the company's agent, the first and second having been paid at his own house in Salem, and the third and fourth at Boston. About two weeks before the fifth premium was due he received a notice stating its amount, to which he objected, because of the manner in which the dividend was computed, and because it required him to pay the premium entirely in cash, while he claimed the right to do, as he had always done before,—pay half in cash and half by note. The notice was sent by an agent at Portsmouth to the plaintiff, who then lived at East Salisbury, Mass. It contained the following: "Please forward your prem. on Pol. No. 478 to the Portsmouth

[1] Currier v. Continental L. Ins. Co. Supreme Court of N. H.

office. The two past years the Boston office has charged us a com. for collecting—by paying here or at the home office, the company saves the com. You can forward the prem. by bank check, or your own private check, on any bank or institution, and can be collected through the bank here—or you can send by express." After receiving the notice, and before the premium became due, plaintiff communicated with the agent, and asked explanations. As the agent could not give satisfactory ones, plaintiff asked for time, and inquired if he should be particular about the date of payment. The agent told him that he had no authority to extend the time, nor to waive a forfeiture, and showed him his instructions from the company, and pointed out to him the ordinary clause providing that premiums were due at the chief office of the company, but that for convenience they were allowed to be paid to any agent who had a proper receipt signed by the officers, with a provision for a conditional receipt by which a premium might be accepted, subject to the approval of the company. There was a clause forbidding agents to waive forfeitures, &c., and a notice that, as an act of grace, lapsed policies might be restored by the company, and that whenever renewal premiums were received after the day they were due, it was with the express understanding that the insured was then in sound health. The agent, however, told the plaintiff that it was not the custom of the company to insist upon forfeitures, and that he had no right to bind them, but that he had no doubt they would do in his case as they did in all others, and the plaintiff understood that in delaying payment he only ran the risk of his wife's remaining in good health. The plaintiff, on Nov. 22, wrote the company for explanations, saying, at the close, "I have deferred the payment of my fifth premium until we come to a proper understanding of the subject. Mr. Loomis suggested that no advantage would be taken by the company while this question was being considered." Nov. 30, 1869, the company answered, giving explanations on the subject of dividends, and informing him that he could pay the fifth pre-

mium in the usual way if he preferred, that is, half cash, half note, but making no other allusion than that to extension of time or waiver of forfeiture. On Dec. 3, plaintiff sent by express to the agent at Portsmouth the entire amount of the premium in cash, but did not pay the express charge, nor did he notify the agent till Dec. 11, and did not then tell him by which of three expresses he had sent it. The expressman embezzled the money. Though the wife remained in perfect health, the company declared the policy forfeited on the ground of non-payment of the premium, waiving the right to a certificate of health and interest on the premiums. At the trial the court reserved all questions of law and fact involved in these two questions: 1. Is the money delivered by plaintiff to the express, to be considered as paid to defendants? 2. Is the policy forfeited by the delay from Nov. 15 to Dec. 3? And the full bench held that the delivery to the express company, under the circumstances, was a payment; that the policy had not been forfeited, and that the decree prayed for, which was for the issue of a paid-up policy, should be granted.

§ 193. In a Wisconsin case, the assured sent a draft for the annual premium after it had become due, and the company collected the draft. The agent of the company, however, wrote to the assured, "as this is past due, it will accord with our rules for you to send us a certificate of good health, and in your case we will be satisfied with your own. You did not instruct me where to send the renewal receipt, and so I have not inclosed it." It was held[1] that it was not clear that the assured did or could understand that the money was received only on condition of his furnishing a certificate of good health, and therefore that a nonsuit should not have been granted, but that the facts should have been submitted to a jury, and after a trial by jury a verdict for the plaintiff was sustained.[2]

§ 194. **Receipt of Premium Waives Forfeiture.**—Receipt

[1] Rockwell v. Mut. L. Ins. Co. 20 Wisc. 335. [2] 27 Wisc

of the premium after maturity is a waiver of the forfeiture, even though the company receives it from its local agent, with no knowledge, on their part, that it had been paid to him after maturity; for, though he may have no actual authority to bind them by receiving payment of a premium note after it is due, the company may receive such payment at any time. If they receive the amount of the note from their agent after it is due, they are bound to inform themselves of the time when it was paid to him; and by receiving it from him without inquiry, they waive the right to insist on the delay in the payment, as a ground of forfeiture of the policy.[1] And this though the policy provides that it may be restored in a certain way and no other.[2]

The premium must, however, be either received by an agent who has authority to contract for the company, or must have been received by the company. In Acey v. Fernie,[3] by agreement with the company, the agent was to collect the premium on policies within fifteen days of their becoming due, and if they were not so paid he was to give immediate notice to the company, in default of which he was to be debited with the premium. He failed to collect a premium till nearly thirty days after it was due, but neglected to report the fact to the company, who, therefore, debited him with the premium. It was held, that this did not renew or extend the policy. The agent had no authority to contract for the company, and the debiting him with the premium was a private arrangement for imposing a penalty upon the agent, which could have no effect as to third parties. But there is no such waiver of the forfeiture for non-payment of the premium, as serves to keep alive the policy, though the company not only demands the premium, but sues for it,

[1] Hodsdon v. Guardian L. Ins. Co. 97 Mass. 144; Froehlich v. Atlas L. Ins. Co. 47 Mo. 406; Carroll v. Charter Oak (F.) Ins. Co. 1 Abb. Ct. of App. Cas. 316; see also Wing v. Harvey, 5 De. G. M. & G. 265; s. c. 27 Eng. Law & Eq. 140.

[2] Mershon v. Nat. (F.) Ins. Co. 34 Iowa, 87; Security (F.) Ins. Co. v. Fay, 22 Mich. 467; Supple v. Cann, 9 Ir. Law, N. S. 1; s. c. 4 Ir. Jur. N. S. 72.

[3] 7 M. & W. 151.

unless the demand is acceded to by the insured, and payment made.[1]

The receipt of a premium, whether at or after its maturity, with knowledge of the facts, is a waiver of the breach of other conditions, as those relating to travel or residence,[2] and it has been held, in an Irish case, to be a waiver of concealment in the application.[3]

Where a contract is expressly renewed, it would seem that, unless otherwise expressed, it is on the same terms and conditions as the original policy.[4] Where it is renewed upon statements made in the original application, there seems to be a diversity of opinion whether such statements must be true at the time of the renewal or need only have been true when originally made,[5] but it would seem most consistent with the apparent intention of the parties to hold that the latter is the case. Where the policy is held to be kept alive merely by a waiver, there can be no doubt that such is the case. There is no new contract. The old one continues.

§ 195. **Waiver After Death not Binding.**—Where the death

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[1] Edge v. Duke, 18 L. J. Ch. 183.

[2] Walsh v. Ætna L. Ins. Co. 30 Iowa, 133; see Bevin v. Conn. Mut. L. Ins. Co. 23 Conn. 244; also Shearman v. Niagara F. Ins. Co. 46 N. Y. 526, and chapter on Waiver, *post*.

[3] Armstrong v. Turquand, 9 Ir. C. L. 32; s. c. 3 Ir. Jur. N. S. 450. How far statements in the prospectus and canvassing documents of the company will operate as a waiver of payment of the premium, has been a subject of considerable discussion. It resolves itself into a question of evidence; namely, whether such papers are admissible to vary the written contract, as contained in the policy, and is considered in the chapter on Evidence. The effect of custom, in extending the time for payment, is also considered there.

In the Scotch case of North Brit. & Merc. Ins. Co. v. Stewart, 9 Ct. of Sess. Cas. 3d series, 534, the company had paid the loss on proof that the insured was dead. It subsequently appeared that this was an error, and it was held that the failure to pay the premiums, after the reputed death, did not forfeit the policy, all parties having acted in good faith.

[4] Hartford (F.) Ins. Co. v. Walsh, 54 Ill. 164; Peacock v. N. Y. L. Ins. Co. 1 Bosw. 338; *ante*, § 103.

[5] Brady v. N. W. (F.) Ins. Co. 11 Mich. 425; N. E. F. & M. Ins. Co. v. Wetmore, 32 Ill. 221; Baltimore F. Ins. Co. v. McGowan, 16 Md. 47; see Foster v. Mentor L. Ass. Co. 3 E. & B. 48; s. c. 24 Eng. L. & Eq. 103; *ante*, § 113.

of the insured has occurred, after the failure to pay the premium but before the acts which are alleged to constitute a waiver, it is held that such acts cease to be of any effect in binding the company, for it is an implied understanding in such cases that the insured is still alive.[1] As in the case of an original insurance, the life must be still in being, so it must be in the case of a renewal or a waiver. Thus,[2] on Jan. 22, 1851, a policy was issued, by the terms of which the premium was payable on Jan. 22 in each year in cash. By one condition the premiums were to be paid "within twenty-one days from the day on which the same should first accrue or become due" and "provided the same should be from time to time paid within such space of twenty-one days the policy should not be void," notwithstanding the liability to pay the sum assured should accrue before the twenty-one days expired. Another condition forfeited the policy if the premium was not paid in twenty-one days after it became due, while still another condition gave the company the right in every case where a new premium became due to terminate the policy by refusing to accept the premium. The premiums were regularly paid, till 1855, but on the 27th of January, 1856, an accident happened, from the effects of which the insured died five days afterward, and the company had notice of the death on Feb. 4. Prior to the death they had sent the receipt for the annual premium to their agent in the country and had no knowledge that it had not been paid. A correspondence ensued with the representatives of the insured as to the cause of the death, both parties being still ignorant of the non-payment of the premium, but the company learned of it, on Feb. 8, though they said nothing till Feb. 13, when they informed the other party that the claim was rejected. It was held that the

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[1] Lefavour v. Ins. Co. 1 Phila. R. 558.

[2] Simpson v. Accidental Death Ins. Co. 2 C. B. N. S. 257. This case is referred to with approbation in Donnald v. Piedmont & Arlington L. Ins. Co. 2 Ins. Law Jour. 738, South Car.

company was not liable, because the premium was not paid before the death occurred, and that, even if the company had by their conduct prevented a tender of the premium within the extended period of twenty-one days, it made no difference as there was no right in the executors to pay it after the death had occurred, and moreover, even if the death had not occurred, the company could, under the last condition, have refused to receive the premium. The court say, "It was contended for the plaintiff, that * * the twenty-one days allowed for the payment of the premium were days of grace, and operated as a prolongation of the time for which the insurance was effected; that the policy had not ceased to exist at the time when the death of the assured occurred; and that, in order to avail themselves of the fourth condition, the directors should have given notice, before the expiration of the preceding year, that they would not renew the policy. * * It was further contended, that payment of the premium was not necessary to keep the policy alive; for that the event, on which the sum insured was to be paid, having happened within the twenty-one days, it was in effect paid, as the directors might deduct it out of the sum which was in their hands payable to the plaintiffs. * * We are of opinion that none of these arguments are well founded. The policy was to continue provided he, the assured, paid the premium within the twenty-one days; and this, we think, did not give his executors the right to pay it after his death; and that the payment of premium mentioned in the first condition, means, such payment as provided for in the body of the policy; and consequently, that, even if the plaintiffs had tendered the premium within the twenty-one days, the directors would not have been bound to accept it. But, if this were otherwise, the second condition appears decisive, viz.: That if the premium is unpaid for twenty-one days after it becomes due, the policy shall be absolutely void; for, we have already said that the defendants were not by their conduct estopped from denying the payment, for that they had not, as alleged in the replication, by their words and

conduct wilfully caused the plaintiffs to believe that the policy was in full force till the 22d of January, 1857; and therefore the doctrine of estoppel by conduct could not apply in this case. We also think that neither the plaintiffs nor the assured, had he been living, would have had an absolute right to keep the policy alive by payment or tender of the premium within the twenty-one days,—the fourth condition giving to the directors the right of keeping alive or renewing a policy, or of refusing to do so, at their pleasure."

§ 196. The case of Pritchard v. Merchants' & Tradesmen's Life Assurance Society,[1] was a similar one. The policy was granted on the payment of the annual premium, on the 13th of October, in each year, and to be void "if the premiums were not paid within thirty days after they should respectively become due," but it could be revived within three months, on satisfactory proof of the health of the insured, and payment of a fine. An annual premium became due on Oct. 13, and the thirty days expired on Nov. 12, on which day the insured died. On Nov. 14, the plaintiff, for whose benefit the policy was effected, sent to the company a check for the premium, and the company, the next day, collected the check, and gave a receipt, as for "the premium for the renewal of the policy, to Oct. 13, 1856." Both parties were, at that time, ignorant of the death. It was held, that the policy was not revived, and that the contract being for the payment of the sum insured, on the future event of the death, a payment of the premium within the thirty days, but after the death of the assured, was not a payment within the condition of the policy, and that there was an implied understanding, when the premium was received, that the assured was then alive. In the early case of Want v. Blunt,[2] the decision was to the same effect, that payment could not be made after death, though it should be observed that the terms of the agreement were express, as to

[1] 3 C. B. N. S. 622.

[2] 12 East, 183; see also Tarleton v. Staniforth, 5 T. R. 695; s. c. on appeal, 1 B. & P. 471; 3 Anst 707, a case of fire insurance.

the necessity of payment during the life of the insured, but a rule of the company allowed payment within fifteen days after the quarter day, if the insured continued in good health.

§ 197. In the case of Mutual Benefit Life Insurance Co. v. Ruse,[1] it appeared "that the policy expressly provides that the premiums shall be paid annually, on or before the 10th day of April, in every year, during its continuance. And it is also to be carefully noted, that the policy explicitly declares that if the premiums are not paid on or before the 10th day of April, annually, the company shall not be liable to the payment of the sum insured, or any part thereof, and the policy shall cease and determine. What, then, is the contract as declared in the policy? It is, that for the premium expressed the company insures the life of Mr. Bugby at the amount ($2,000) stipulated. The contract is from year to year, and dependent for its continuance upon the payment of the premium, on or before the 10th day of April in every year. This is, necessarily, the duration of the contract, because of the express declaration, that if the premium is not paid on or before that day in every year, the company shall not be liable, and the policy shall cease and determine. This policy, then, was of force up to the 10th day of April, 1847, the premiums anterior to that date being paid. The premium due on that day not being paid, the policy on that day ceased and determined. At and after that day, there was no contract between the parties. Bugby was not insured, and from thenceforward the parties stood relatively to each other, as they did before any contract had been made. Bugby, the insured, dying subsequently to that day, his insurer had no more right to call upon this company for the insurance than upon any other company or citizen. Such is clearly the truth, as to this contract, found in the policy itself." The court further held that, even if the time for payment could have been held to be extended, yet it

[1] 8 Georgia, 534.

could not, under any circumstances, be implicitly extended beyond the period of the death, and that there could be no possible right to pay the premium after the death had occurred. They say, "The absurdity of requiring, under any arrangement, a company to insure against fire goods already burned, or the life of a man already dead, will readily strike the commonest mind. * * If the defendants could be made liable at all upon the facts of this case, it strikes me that it could rest alone upon the idea, that the tender of the premium within thirty days, is a new contract. This article contains no provision which allows the company to reject the tender if made within time, and thus prevent a new contract upon the terms of the old policy. And if a tender of the premium had been made in this case, beyond the day of payment named in the policy, and before the expiration of the thirty days, the insured being in life, I should incline to the opinion, that they would have been bound by it; but if made within the thirty days, the insured being dead, and the fact of his death known to the parties, there would be, in that event, no contract, no consideration for the insurance, no mutuality. It would be an act of mere fatuity, out of which no liability could spring. And if the fact of the death of the insured is known to the insurer, and its knowledge withheld from the insurers, and they accept the premium, the contract would be void for fraud. If known to neither party, it would equally be a void contract. There can be no valid contract for the insurance of the life of a dead man."[1]

[1] An action between the same parties, on another policy on the same life, is found reported in New York, where the same question was involved, 26 Barb. 556. The point chiefly discussed there is as to the insurable interest, and the effect of the prospectus issued by the company. In the Georgia case, the tender of premium was clearly made after the death, but within the alleged extended period of thirty days from the day when it became due, and the point was, as above shown, considered by the court. In the New York case, the question as to the right to pay after the death had occurred does not seem to have presented itself to court or counsel. There is, indeed, in the published report, some apparent discrepancy as to the fact when the tender was made relatively to the time of death. In the Supreme Court, Sutherland. J., states expressly, that the premium was paid, or tendered, the day before the death; but in the Court of Appeals, 23 N. Y. 516, Selden, J., speaks of it as tendered "on or about the day of death;" while the

§ 198. **Days of Grace.**—Where days of grace are allowed for payment, the language of the policy may be such that the company would be liable by reason of the prior payment in case the death occurred during such period. In other words, the language may be such as to make the company liable for the year and the days of grace additional. In an Irish case, a fire policy was for a year from March 25, 1830, to March 25, 1831, and renewable, from time to time, if the company thought proper, provided that "no policy will be considered valid for more than fifteen days after the expiration of the period limited therein," unless the premium is paid. A loss occurred after the end of the year and before the expiration of the fifteen days, and it was held that the insurers were liable, as the contract was in effect for one year and fifteen days.[1]

§ 199. **Premium Due on Sunday may be Paid Monday.**—If the last day for the payment of the premium, as fixed in the policy, occur upon Sunday, at noon, the premium is not payable till the following Monday, and the company is liable if the assured dies Sunday afternoon.[2] In the first case cited, the court say, "The whole inquiry is reduced to this point, when was the quarter-yearly payment for the quarter succeeding that commencing on the 1st of July, 1854, due, and by law required to be paid? Adopting the proper division

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head notes of the reporters, in both courts, say the tender was after the death. An examination of the original papers on the appeal shows what the fact was, as well as the cause of the discrepancy. The agent who effected the insurance, and to whom the premium was tendered, at first speaks of the tender as having been made on April 13, while the death is, in one place, spoken of as occurring on April 14, and in another place, on or about April 13. The agent, however, says expressly that the tender was after he had heard of the death; and a letter, written by him to the company, on April 19, was put in evidence, in which he speaks of the death as having occurred on the night of the 14th, and of the tender as made subsequent to his learning of the death. The counsel, on both sides, assume that the tender was, in fact, after the death, as it undoubtedly was. Had the point we are considering occurred to the court, they would probably have been saved some difficulty. See also, upon this point, Howell v. Knickerbocker L. Ins. Co. 3 Rob. 232, and remarks, *post*, § 200.

[1] McDonnell v. Carr, Hayes & Jones, 256; see Tarleton v. Staniforth, 5 T. R. 695; Salvin v. James, 6 East, 571; *post*, § 200.

[2] Hammond v. Am. Mut. L. Ins. Co. 20 Law Reporter, 273; s. c. 10 Gray, 306; Campbell v. Internat. L. Ass. Soc. 4 Bosw. 298; Taylor v. Germania (F.) Ins. Co. 2 Dillon, 282.

of the year into four quarters, and commencing on the 1st of April, 1854, the third quarter would commence on the 1st of October, and the premium to be paid for that quarter, irrespectively of the circumstance that the first day of October occurred on Sunday, would be required to be paid on that day. The assured had, however, until the 1st of October at noon to pay the premium. He was not in default before that time, unless it be that in case the 1st of October occurring on Sunday, he was required to pay the premium on the Saturday preceding. The only question in the case seems to be whether Sunday is to be excluded as a day of payment, and the payment properly postponed till Monday, or whether the party, to save his policy from being forfeited, must make his quarterly payment on or before Saturday, when the quarter day falls on Sunday. We have on the one hand the rule as to commercial paper, or negotiable notes payable with grace, requiring payment to be made on Saturday where the third day of grace falls on Sunday; and on the other a rule, generally adopted as to other contracts to pay money, or perform other specific duties on a certain day named, that if such day falls on Sunday the day of performance is postponed till Monday. In reference to notes payable on a certain day, but entitled to three days' grace, it is said that in such case the note by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and therefore if the last of three days of grace falls on Sunday, the payment must be made on Saturday, and that it was more reasonable to take from than to add to a period of time thus originally allowed as mere grace and favor. But as to other contracts, which by the face of the instrument required a payment on a day which proves to be Sunday, to discharge literally the promise or duty, the law seems to sanction the postponement of the time for doing the same till the Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business. The statute law forbids all such acts. The

party paying and the party receiving money on that day in discharge of a contract would subject themselves to a penalty for so doing. Sunday was not a day contemplated by the parties as embraced in the stipulation to pay a quarterly premium on the first day of October, in each and every year, during the life of the party assured. The defendants had no office open on that day, and were under no obligation to receive the payment of the premium on that day, if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act, but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured, in not paying the premium fully due on the 1st of October, as should be held to terminate the policy. It is urged on the part of the defendants that this was not an ordinary contract, to be performed on a day certain, and that the assured was under no legal obligation to pay subsequent premiums after the expiration of a quarter of a year; but such payment was a voluntary act, to be done or not done at his election; and therefore that the rule of law applied to a contract binding a party to do some act at some future named period, which proved to be Sunday, has no application here. But we think the rule, as to the time of making the payment, is the same in both cases. It was the purpose of the assured to obtain a policy to continue during his life. Such policy was issued to him, but upon condition that he should make his quarter-yearly payments regularly in advance. It was obligatory on him to pay, if he would continue the policy in force. The day of payment was, on this occasion, the first day of October. That day, as it appears, fell on Sunday; and this being so, he was entitled to the ordinary privilege of discharging his obligation on the Monday following. The quarter-yearly payment, it is true, in terms became payable on Sunday noon; but that day was not a day for secular business, and, therefore, legally speaking, Sunday was not the day 'at which the same became payable; and so, by the

very provisions of the policy, properly construed, the quarterly premium was seasonably tendered on Monday.'"[1]

§ 200. **No Liability Unless Death Occurs During Continuance of Policy.**—The death must actually occur within the time the policy continues, and it makes no difference that, though the death occurs after the expiration of the policy, it arises from a mortal wound received before it expired.[2] Thus in Howell v. Knickerbocker Life Insurance Co., a policy issued for the benefit of the plaintiff upon the life of her husband, was expressed to be "for the term of one year, commencing the 15th day of July, 1853, at 12 o'clock, noon, and ending at 12 o'clock, noon, on the 15th day of July, 1854," "and it is hereby agreed that this policy may be continued in force, from time to time, until the decease of the said insured, provided that the said assured shall duly pay, or cause to be paid, to the company, annually, on or before the fifteenth day of July, in each and every year," the premium specified. About 10½ o'clock, A. M., on July 15th, 1862, the insured was struck with paralysis, became speechless, and died the next day, not having paid the premium, though he had intended to do it the day he was struck down. After his death, the premium was tendered and refused. On a trial, the Superior Court of the city of New York, held[3] that the company was not liable, saying: "It is contended, on the part of the plaintiff, that on the 15th day of July, the day on which Mr. Howell was striken with apoplexy, he received his death wound or mortal stroke, and that he was then dead to all intents and purposes. This cannot be, because Mr. Howell was alive, and died on the 16th: and it will not be contended that if Mr. Howell, after apoplexy had seized him, had lingered for months, and the policy had not been renewed by the payment of the premium, the parties for whose benefit the policy was effected could have recovered, and the rule is as strict with a day of neglect as with a year; if they could not renew after the lapse of a year, they could not after the lapse

[1] See Campbell v. Internat. L. Ass. Soc. 4 Bosw. 298; *ante*, § 179.

[2] Lockyer v. Offley, 1 T. R. 260, per Willis, J.

[3] 3 Rob. 232.

of a day, without the consent of the company. Something has been said about an agreement on the part of the company with the deceased, to the effect that days of grace would be allowed if the premium was not paid on the day it became due. I can find no such agreement in the case; on the contrary, the complaint alleges that the yearly premiums were all paid promptly on the 15th day of July, in each and every year, agreeably to the terms of the policy. It is true, there is evidence introduced to the effect that the company, in dealing with other persons, allowed days of grace within which to pay the annual premium beyond the time fixed by the policies, and that, in accordance with that custom, they had been in the habit, in some cases, of receiving premiums after the days fixed, and that it was understood and agreed verbally between Mr. Howell and the company, at the time the insurance was effected, that, if anything should happen to him to prevent his paying the premium on the day it became due, the policy should not become null and void. This evidence was objected to, and should have been excluded; but even if it had not been objected to, it would not help the plaintiff's case. No verbal agreement or understanding of any kind can vary the terms of the policy, and the custom of the company, or their verbal agreement, if any there was, only extended to lives in being. It could not, and was not intended to, apply to premiums offered to be paid after the death of the insured."

This case was carried to the Commission of Appeals,[1] where one of the judges, after quoting the provision as to the payment of the premium, says: "If the clause * * had in no way been modified, I should have no hesitation in holding that the plaintiff could not recover. Payment was a condition precedent to the continuance of the policy, and no mere accident or act of God, however controlling, could continue the policy in force after the pay day, without payment. This could be done only by the agreement or consent of the defendant properly given, or by an act which would

[1] 44 N. Y. 276.

estop the defendant from denying payment." The case prepared on appeal, however, stated that on the trial, the defendants admitted that at the time the insurance was effected, and thereafter when the annual premium was paid, it was understood and agreed, that if anything should happen to prevent the insured from paying the premium on the day it became due, the policy should not become void, but should continue in force for a reasonable time, and the court therefore held that they were bound to assume that this admission referred to a valid agreement, which became a part of the policy, and in effect amounted to an admission that the policy was in force at the time of death. They therefore, by a divided court (one of the majority not having been present at the argument), reversed the decision below. Admitting that the court were correct in holding the policy to have been modified as implied in the incautious admission made on the trial, it is to be observed that the Commission of Appeals wholly failed to allow any weight to the cases in which it is held that an agreement to allow days of grace in which to pay the premium, does not apply where death occurs before the premium is paid. They held, in substance, that the contract was for a year and a reasonable time thereafter.

§ 201. In a case in Massachusetts,[1] the policy on the life of plaintiff's husband, for twelve months, from noon of the day of its date, provided that the company should pay the sum insured, on proof "that the assured, at any time after the date hereof, and before the expiration of this policy, shall have sustained personal injury, caused by any accident," "and such injuries shall occasion death within ninety days from the happening thereof." By an accident occurring at 9 A.M., the assured sustained injuries which caused his death about the same hour, on the ninety-first day thereafter, excluding the day of the accident. The whole period was within the twelve months. The court says: "No computation of time will bring the death 'within ninety days from the happen-

[1] Perry v. Provident L. Ins. & Inv. Co. 99 Mass. 162.

ing' of the accident. But the rule of computation is stated in Atkins v. Sleeper.[1] When time is computed from an act done, the general rule is to include the day. When it is computed from the day of the act done, the day is excluded. The language of this instrument requires that the computation be made from the time of the act done, namely, the accident. But it is contended that, as this is an insurance for twelve months, the provision by which it is attempted to exempt the company from liability for the death of the insured, happening from a cause within the meaning of the policy during said term, is inconsistent with the general object and tenor of the policy, and is void. No such inconsistency is apparent to the court. On the contrary, the policy clearly describes the cases in which the loss of life shall make the company responsible, and limits the liability to such cases. It is further contended that, if the provision in the policy, that the injuries shall occasion death within ninety days, can have any legal force or effect, it must be construed to mean such injuries as shall occasion death within ninety days after the termination of the twelve months. But, as the ninety days are expressed to be from the happening of the accident, this construction cannot be adopted. It is said, that unless the clause be void, or be construed as above stated, an effectual life insurance for more than ninety days was impossible. If this were so, it would be a result of the terms of the contract upon which the action is brought. But here is simply an insurance against certain accidents, which may happen within a given time, and result fatally within a given time after they happen. The loss in this case came very near being within the terms of the policy, but was not quite within them."[2]

§ 202. With reference to the termination of the policy by its own limitation, policies ordinarily provide that they shall extend to a day named at noon, and if the premium is not

[1] 7 Allen, 487.

[2] A subsequent decision in this case will be found referred to in the chapter on Accident Insurance.

then paid, they expire. In the absence of such a provision, the policy would, doubtless, continue in force till midnight of the last day. A fire policy, which insured "from the 14th Feb., 1868, until the 14th Aug., 1868, and for so long after as the said assured should pay," has been held to cover a loss occurring on the night of Aug., 14th, 1868, though there had been no renewal.[1]

§ 203. **Non-Forfeiture Law of Massachusetts.**—The State of Massachusetts has a law known as "the non-forfeiture law," which provides that no policy of life insurance, issued by corporations created under its laws, shall be absolutely forfeited by reason of the non-payment of the premium on the day named in the policy, but that the excess of premiums already paid, shall be applied to keep it in force for an extended period, to be calculated according to a formula laid down in the law.[2] A similar act has been passed in some of the other States. Its effect may be, where the death occurs within a few years after the issue of the policy, to extend the duration of the policy very greatly. Some companies insert

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[1] Isaacs v. Royal Ins. Co. 39 L. J. Exch. 189. See *ante*, §§ 172. 179, 180.

[2] This law, which was passed in 1861 (c. 185), is as follows:

"Section 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this commonwealth, shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the 'combined experience,' or 'actuaries,' rate of mortality, with interest, at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid.

"Section 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; provided, however, that notice of the claim, and proof of the death shall be submitted to the company within ninety days after the decease; and provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount at six per cent. per annum of the premiums that had been forborne at the time of the death."

a similar provision in their policies, usually, in such case, reserving to their actuary the right to decide how long the policy is extended. No case seems to have arisen in the courts, where the Massachusetts law has had any effect in extending the duration of the policy. In Pitt v. Berkshire Life Insurance Co.[1] it came in question, but had no practical effect. In Greenfield v. Massachusetts Mutual Life Insurance Co. the only claim under a policy was based upon this law, but it appeared that, in point of fact, the law did not keep the policy alive till the time of the death, and the case turned chiefly upon the question, whether the company were estopped by their admissions that it was so continued in force. A question, however, arose, under that portion of the "non-forfeiture act" which makes its applicability dependent upon the fact, that "notice of the claim, and proof of the death, shall be submitted to the company within ninety days after the decease." The company had issued two policies upon the life of the deceased, one numbered 10,167 and the other 16,722. Proofs of death were presented which referred only to the latter policy by its number. No reference was made to the former one, because it was supposed by all parties to have ceased to have any effect. The only "claim," other than this, was a verbal application for the insurance moneys without specifying the policy. The Supreme Court held that this was a sufficient compliance with the statute. They say: "Proofs of death were presented unaccompanied by any specific claim. The presentation of these proofs was itself a sufficient notice of the claim made, and it will be intended that such claim was commensurate with the rights of the person making it, or for whose benefit it was made." Upon appeal this case was reversed upon another point[2] but affirmed as to this question, the court saying: "Upon this assumption the plaintiff had a valid claim upon the policy, by complying

[1] 100 Mass. 500; *ante*, § 182.

[2] 47 N. Y. 430. In Shaw v. Berkshire Mut. L. Ins. Co. 103 Mass. 254, it was held that the receipt of a renewal premium on a policy issued before the passage of [illegible] did not so make it a new contract, entered into after its passage, that the law to it.

with its conditions as to proof of death and presenting the claim to the company. The company had the right to waive any of these conditions. Proof of death was duly made. The objection is the neglect to present a claim founded on this policy. The company had a right to waive this formality. The promise by the company to pay with full knowledge of the fact was a waiver and obviated the objection."

§ 204. **Presumption as to Date of Death.**—Questions as to the time of death, and as to the presumption of death when there is no evidence upon the subject, except the disappearance of the insured, may become important, though in this country it is rare that a policy is kept alive by the payment of the premium after the insured has disappeared. In England, the person for whose benefit the policy is issued or held, frequently has not and never had any knowledge of the person whose life is insured, and questions of this nature therefore have a more practical importance there. In an early case,[1] the question arose as to when the death occurred. The policy expired, Jan. 30, 1778. It appeared that about Nov. 28, 1777, the insured sailed from the Cape of Good Hope, in a vessel that was never afterwards heard of, but which was supposed to have been lost in a storm off the Western Islands. Evidence was given by captains who sailed in other vessels the same day, in the same course, that about Jan. 13, or 14, they encountered a severe gale which they weathered with difficulty, and that the other vessel being smaller, would have found it more serious than they. Lord Mansfield left it to the jury, to say whether they thought the evidence sufficient to convince them, that the assured died before the time limited in the policy, adding that if they thought it so doubtful as not to be able to form an opinion, the defendants ought to have their verdict; the jury found for the plaintiff.

§ 205. As to the date of death, the rule of common law

[1] Patterson v. Black, 2 Marshall on Ins. 781; s. c. Park on Ins. 919. Angell in a note to section 351, gives a newspaper report of a case where the question of the time of death of a person who suddenly disappeared, was submitted to a jury in Kentucky.

is, that the presumption of life with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living, and after that time the burden of proof is devolved upon the party insuring the life of the individual in question, who must prove him to be alive.[1] But in any particular case, the jury are at liberty, from facts proved, to infer the death at any earlier period; and among the facts which they may take into consideration are his age, situation, habits, employment, state of health, physical constitution, his position and intentions when last heard from,[2] accompanied by evidence of inquiries at his last known residence, and among his friends.[3] In Tisdale v. Mutual Benefit Life Insurance Co.[4] it was held that it was incumbent upon the plaintiff to show the death of the insured; that proof that letters of administration had been granted in a Probate Court on the effects of the insured constituted *prima facie* evidence of his death, and changed the burden of proof from the plaintiff to the defendant, and, in the absence of countervailing evidence, entitled the plaintiff to recover, but that the proceeding before the probate judge being *ex parte*, it did not require very strong evidence to overcome the *prima facie* case thus made. It was also held, that where the insured had suddenly disappeared, the absence of motive to abscond was a material fact, to be taken into consideration in a doubtful

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[1] Angell, § 351; 2 Greenleaf on Ev. § 278; 1 Ib. 30, 41; Best on Presumptions, § 140; Tisdale v. Mut. Ben. L. Ins. Co. 3 Ins. Law Jour. 58; Tisdale v. Conn. Mut. Ins. Co. 26 Iowa, 171; s. c. 28 Iowa, 12; Smith v. Knowlton, 11 N. H. 191; Doe v. Nepean, 5 B. & Ad. 86; Nepean v. Doe, 2 M. & W. 894; Gilleland v. Martin, 3 McLean, 490; Loring v. Steineman, 1 Met. 204. New York has a statute to this effect, 1 R. S. 749, § 6. See also, Burr v. Sim, 4 Whart. 150; Newman v. Jenkins, 10 Pick. 515; Bradley v. Bradley, 4 Whart. 173; Doe v. Flanagan, 1 Geo. 538; *In re* Benham's Trust, 4 L. R. Eq. Cas. 418; Tilly v. Tilly, 2 Bland. Md. Ch. 436.

[2] White v. Mann, 26 Me. 361; McCartee v. Camel, 1 Barb. Ch. 455; Rex v. Harborne, 2 Ad. & El. 540.

[3] Greenleaf on Ev. § 278; McCartee v. Camel, 1 Barb. Ch. 455; *In re* Creed, 1 Dolwry, 235; How, *in bonis*, 1 Swab. & Trist. 53; *Re* Tindall's Trust, 30 Beav. 151; Smyth, *in bonis*, 28 L. J. Prob. 1.

[4] 3 Ins. Law Jour. 58; North Brit. & Merc. Ins. Co. v. Stewart, 9 Ct. of Sess. Cas. 3d Ser. 534, is a case where a company had paid the insurance on the life of one who was subsequently shown to be alive.

case, while cases of mistaken identity are so frequent that evidence that the insured was seen subsequent to the appointment of an administrator, if it is inconsistent with other evidence in the case, must be received and considered with scrupulous care, that, moreover, the mere fact of the disappearance of the insured without apparent motive is not a sufficient ground from which his death could be inferred, but that the jury must take into consideration all the facts and circumstances attending his disappearance and absence, including the time he had been absent and not heard from, his state of mind, and family and business relations.

§ 206. In a case in New York,[1] a married woman had procured, under the statute, a policy upon the life of her husband, in her own name, payable, however, to her children in case she should die before her husband. She, her husband, and only child, sailed for Europe in a steamship, which was never afterwards heard of. The question of the right to the insurance money came before Chancellor Kent. There was a testamentary paper made by the wife, which was held void, and it being also held that there was no presumption that the daughter survived her mother, it was decided that the insurance money passed to the husband's representatives. Chancellor Kent said, in the course of his decision, "The insurance money in this case, by the terms of the policy, was made payable to the children of the assured, in case she died before her husband. If her daughter had survived her, therefore, it would have been necessary, perhaps, to inquire whether there is any legal presumption that the husband survived his wife, when they have both perished by the same disaster, and when there is no extrinsic evidence to guide the judgment of the court upon this matter of fact. * * But as there is no presumption of the survivorship of the daughter, in this case, after the death of her mother, and the probability is that they both perished at the same moment, it becomes immaterial to inquire whether it must be presumed that the

[1] Mœhring v. Mitchell, 1 Barb. Ch. 264; s. c. 3 Denio, 610.

husband survived his wife. It is sufficient for this case, that there is no legal presumption that she survived him. For, if she did not survive him, I am of opinion that the act of April, 1840, does not extend to the case; and that, in the event which has occurred, this contract of insurance stands upon the same footing as any other contract made by a *feme covert*, in her own name, in the lifetime of her husband, and without the intervention of a trustee. By referring to the first section of that act, it will be seen that the insurance money is only payable to her, to and for her own use, free from the claims of the representatives of the husband and of his creditors, in case she survives her husband; but not where they both die at the same instant, or where he survives her. The second section of the statute provides for the case of survivorship of the husband where the wife has left children, by authorizing the insurance money to be made payable to such children, or to their legal guardians, for their use. But no provision is made by the statute for this case, where there are no children, and where the husband survived the wife, or where they both perished at the same instant, so that neither survived the other." With reference to the presumption of survivorship, as between husband and wife, where they perish in one disaster, it has been said that it will be presumed, in the absence of any evidence on the point, that the husband survived,[1] but this seems to be decided otherwise.[2] But Greenleaf thinks[3] that, "in the absence of all evidence of the particular circumstances of the calamity," the presumption that both perished together, "will be found the safest and most convenient."[4]

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[1] Rex v. Hay, 1 W. Bl. 640; Mason v. Mason, 1 Meriv. Ch. 308.

[2] See Underwood v. Wing, 31 Eng. Law & Eq. 293; s. c. below, 23 L. J. Ch. 982; Wing v. Angrave, 8 H. of Lds. Cas. 183.

[3] Evidence, vol. 1, § 30.

[4] See Coyer v. Leech, 8 Met. 371; Taylor v. Diplock, 2 Phillim, 261; Selwyn's Case, 3 Hagg. Ec. Rep. 748; Pell v. Ball, 1 Cheves' S. C. Ch. 99; Beck's Med. Jurisp. 635, 648. As to presumption of survivorship between grandson and grandmother, see *Re* Tindall's Trusts, 30 Beav. 151.

CHAPTER VI.

THE POLICY AND ITS PROVISIONS.

§ 207. In practice, an agreement, known as a policy of insurance, is always given, or intended to be given, in life insurance contracts. Though the general form of all policies is the same, it is not necessary that they should follow any particular form or use any especial words. There need only be an agreement, from which the court can see an understanding to pay a sum of money on the occurrence of a loss.[1] The policies in use by the life insurance companies of this country, are substantially alike in their forms, and in the conditions they contain. The phraseology differs with the different companies. Some insert more conditions than others, and there are differences in the mode of insertion, whether upon the face of the policy, or on its back, or in the application. Where conditions are not inserted upon the face of the instrument, they are by language more or less direct made a part of it. Some exercise, in form at least, more liberality than others towards the assured, with reference to travel and residence, to suicide, and to some other matters, but the same legal rules apply to all. Any violation of any condition of the policy absolutely forfeits it.

§ 208. **Contents of Policies.**—As a general thing, a life policy contains the following particulars: the names of the party insured and of the person for whose benefit the insurance is effected, being the insured and the assured, respectively; the amount of premium and its mode of payment; the amount insured; the period, whether for life or a term of years; the time of payment, and the conditions on which the policy is to be forfeited. These conditions em-

[1] See remarks of Buller, J., in Good v. Elliott, 3 T. R. 693, 702, citing Lord Mansfield.

brace, usually, any fraud, misrepresentation, or concealment in the application; non-payment of premium at the time fixed; travel or residence in certain specified regions; death by his own hands, by the hands of justice, in a duel, or in consequence of a violation of law; employment in the naval service, or the military, otherwise than in the militia not in active service; to which is not infrequently added, employment in certain extra hazardous pursuits, as at sea, upon a railroad, in a powder mill, &c. Sometimes, also, a condition as to habits of intemperance is included, and less frequently, one against an assignment of the policy without the consent of the insurer. In special cases, some other conditions may be added, but they are all of the same general nature. The legal effect of these conditions, where the policy is obtained upon the life of one over whose proceedings the beneficiary has no control, and of whose acts he may be wholly ignorant, may be very serious. The American policies, in terms, make no distinction between such cases and those in which the policy is issued directly to the insured. Under both, a violation of the condition forfeits the policy. The English companies, however, adopt a more liberal and equitable system, by making distinctions in favor of *bona fide* holders of the policies, similar to those inserted in case of suicide.[1] Mr. Bunyon commends a clause,[2] which provides that "if the person whose life is assured, go beyond the limits allowed, or become a seafaring person, or engage in active military or naval service, before the fact has been communicated to the directors, the policy shall not become void, if the party interested make the communication as soon as the fact comes to his knowledge, and pay the additional premium which would have been required if the fact had been known at the time it occurred."

§ 209. **Limitations of Residence and Travel.**—Among the conditions usually inserted in policies,[3] is one limiting the

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[1] *Post.* [2] P. 70.

[3] The conditions of the policy relating to representation, warran ‧t, and those relating to the non-payment of premium, have been cc ‧s 3, 4, and 5.

place of residence or travel. The English companies frequently forbid a person insured to leave Europe or go upon the sea.[1] The American policies forbid travelling by sea, residence within certain limits during certain months of the year, and passing beyond the settled limits of the United States. This condition, like all others, must be strictly observed, unless it is expressly or impliedly waived by the company. The companies, however, freely give permits for a single and temporary, or a permanent, breach of these conditions, both with and without demanding an extra premium therefor. Unless there is such a permit, or a waiver in some other form, a violation of the condition forfeits the policy. In the absence of a provision to the contrary, it makes no difference whether the death occurs in consequence of the violation of the condition or not, nor whether it occurs during the continuance of the violation or afterward;

[1] Bunyon (p. 67) gives the language of the condition upon this subject, adopted by different English companies, as follows: "In some it avoids the policy if the assured '*shall die* upon the high seas, unless license be obtained from the court of directors.' In others, if he '*shall die* upon the high seas, unless in passing direct from one part of the United Kingdom to another, or in passing, during peace, from any part of Europe to any other part of Europe without previous license from the directors to go upon the seas.' In others, if he '*shall die* on the high seas, except in passing from one part of the United Kingdom of Great Britain and Ireland, to another; * * and also in time of peace from any part of Europe to any other part of Europe; but the foregoing exception is not to extend to persons who, at the time of death on the high seas shall be employed in a seafaring capacity, unless in each case permission shall have been granted by the directors, which may be obtained on such parties giving every requisite explanation, and paying an extra premium to be settled by the directors.' In others, or 'if without the consent of the directors for the time being, he shall engage in the preventive service, or any seafaring occupation, or shall go upon the sea in a vessel not decked or seaworthy, or shall proceed to any part of the globe within thirty-three degrees of the equator.' In these conditions, the most obvious distinction is, that in one class the policy is avoided in the event of going on the high seas; in the other, in the event only of dying while on them. The distinction is important, as such a condition would be strictly construed. Any going on the high seas, therefore, although attended by no evil results, would in the one case avoid the policy, while in the other the assured is made his own insurer as to maritime risks, and during the term of the voyage as to all other risks, but on its termination the insurance by the policy revives, if unaffected by any other condition. A fifth condition is, if the assured 'shall go beyond the limits of Europe;' or again, 'shall go beyond the limits of Europe, except to Madeira;' or in other companies, 'if he shall proceed to Australia, or to any place distant less than thirty-three degrees from the equator, or voyage within that limit;' or again, 'shall proceed to any part of the globe within thirty-three degrees of the equator, or during actual warfare shall go beyond the limits of Europe.'"

in either case the policy is forfeited. In the case of the Episcopal Bishop of Rhode Island, who went to Maryland, which was within the forbidden limits, and there died, the forfeiture was enforced.[1]

§ 210. "**Settled Limits.**"—Of the phrases used in conditions of this nature, some have received judicial interpretation. The words, "settled limits of the United States," as applied to the region of residence or travel, have been held to be equivalent to the words, "established boundaries." They restrict, it is held, the assured within the geographical boundaries of the Union, including the Territories, organized and unorganized, but not within the inhabited portions of the country, or the region of settlements. It was, therefore, held that such a condition was not violated by a person who joined an emigrant train, in 1850, on the overland route to California, and died in the wilds, on the South Fork of the Platte River.[2] Bacon, J., in his opinion in this case, says: "It is claimed, by the counsel for the respondent, that the words, 'settled limits,' as used in the policy, mean 'established boundaries,' and that they are susceptible of no other fair or reasonable interpretation. On the other hand, the defendants' counsel insists that these words are synonymous with the phrase, 'the region of the settlements,' and that, consequently, as the assured could only reach California by going into, and passing through, an unsettled region of the country, the policy was forfeited. It is, on all hands, conceded that the place of Casler's decease was within the established boundaries of the United States. If the words, 'settled limits,' had been only once used in the policy, and in no other connection than the one in which they first occur, I think it would readily be conceded, that the most natural and obvious interpretation is that given to them by the plaintiff. The word 'settled,' when used in connection with the word 'limits,' has its most natural synonym in the words 'fixed,' 'determined,' 'established.' And the word 'limit,'

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[1] Nightingale v. State Mut. L. Ins. Co. 5 R. I. 38.
[2] Casler v. Conn. Mut. L. Ins. Co. 22 N. Y. 427.

most obviously and normally, designates a bound, a restraint, a circumscription, a boundary. If the words are to be understood in any other sense than as designating the recognized or established boundaries of the country, there are practical difficulties in giving them an application, such as would almost authorize a court to pronounce them void for uncertainty. What are we to understand by 'the region of the settlements,' and when could a man be said to be within or beyond them? How thickly must, or how sparsely may, any given section of the country be populated, to come clearly within the scope of these terms? We have, in the very heart of this State, a vast region almost entirely untenanted by man. From the eastern boundary of the county of Oneida, extending almost to the shores of Lake Champlain, there stretches a wide expanse of unsettled and, almost literally, an uninhabited country. * * It is far enough beyond the region of the settlements; and yet it would be a rather startling proposition, that any one, who should happen to have such a life policy as this, and who, for the purposes of relaxation, amusement, or the love of adventure, should penetrate that great wilderness, would, by that act, run the risk of forfeiting all his interest in his policy. Again, there are, in several of the Western States, extensive prairies, varying in width from fifty to a hundred miles. On either side, are the habitations of men, and the accompaniments and appliances of civilized life; but in the wide and sea-like expanse, nothing human lives. Suppose the traveller, passing over this region, should be overtaken by sudden illness, and perish in the midst of the prairie, without aid, or the power of invoking it, would he be within or without the region of the settlements? Considerations like these, seem inevitably to lead to the conclusion, that the language of the policy must have been used to indicate the established boundaries of the country; and such, upon the whole, I am satisfied is the interpretation that should be given to them. This is the more natural and ordinary signification of the language, and it is susceptible of a precise

and definite application; for the boundaries of the nation are either well known, or are capable of perfect ascertainment." Selden, J., says, in the same case, "The primary definition of the word 'settled,' is placed, fixed, established. It is true, it is also, though more rarely, used as descriptive of a section of country that is 'planted with inhabitants;' but it is obvious that it can never, with propriety, be used in the latter sense in connection with the word 'limits.' Limit means boundary, border, the outer line of a thing, and nothing else, except when used to convey the idea of restraint. There may be a settled region, a settled country, or a settled territory; but there can be no such thing as a settled limit, in the sense contended for. To give the clause in question this signification, therefore, it becomes necessary to change its entire structure, and to substitute for the words 'the settled limits,' the phrase 'the region of the settlements.' * * To provide that the insured should not, without the consent of the company, go without the bounds of the United States, would be a perfectly natural and proper provision; and this is precisely what the phrase in question means, upon a plain, literal construction of its terms. But what sort of a contract should we have upon the other construction? Who can interpret the phrase, 'the region of the settlements?' Can any one tell, with any precision, what it means? Is it not, in the highest degree, vague and indefinite? * * It has been suggested that, by the phrase, 'settled limits,' it was intended to embrace all the organized States and Territories of the Union, and to exclude all other territory. The language, however, seems ill-adapted to convey the idea, and there is nothing in the circumstances, or in the nature of the contract, to indicate any such intention. It is certainly safer, and more in accordance with legal principles, where there is so much doubt, to adhere to the plain, literal meaning of the terms of the contract." Three of the eight judges dissented from these opinions, and held that the phrase "settled limits," meant the region of civilized habitation,

where the life of the assured would be exposed to no extraordinary dangers.

§ 211. **Waiver by Permit.**—As already stated, it is very common for the companies to give an express waiver of the condition as to residence or travel, in the form of a permit to reside or travel in the districts forbidden by the policy. In such a case, the permit will, where it is at all ambiguous, be construed in favor of the insured; but, if its terms are clear, it is held to be a waiver only to the precise extent, and in the precise form, laid down in it. In an English case,[1] the plaintiffs had procured a policy upon the life of another, in 1853. The policy contained a condition that it should be void if the insured went beyond the limits of Europe, without the consent of the insurers. One of the plaintiffs, who was an agent of the company, had, before the policy was issued, written them that the insured had lived for several years in Honduras, and "intends returning there for a few years in about a month;" he "proceeds to Belize about the end of this month." At the time of the issue of the policy, there was indorsed upon it a permit, reciting that "the life insured under this policy being about to proceed to and reside at Belize, in the State of Honduras, and an extra premium of 20 guineas having been paid for the extra risk for such residence for one year, permission is hereby granted to the life assured, to proceed to and reside at Belize aforesaid and for the time aforesaid, and for so long thereafter as the extra premium shall, from time to time, be paid, along with the premium payable on this policy." The extra premium for a year's foreign residence, was paid June 23, 1853 and the regular premiums were paid as they became due, till Dec. 22, 1857. The assured did not go to Belize till June 9, 1856, arriving "there about the middle or latter end of August," and he died there Aug. 13, 1857, within a year after his arrival. It was claimed that the policy was forfeited because the permit intended that the insured should proceed to Honduras within a reasonable time; it was also claimed that,

[1] Notman v. Anchor Ass. Co. 4 C. B. N. S. 476.

if this was not so, the year for which the extra premium was paid, must count from the commencement of the voyage. But the court decided against both these positions. Cockburn, C. J., says: "In all probability, at the time the agreement was entered into, whereby permission was given to Mr. Stirling to go to and reside at Belize, on payment of the additional premium for the extra risk, both he and the company supposed that he was about to proceed thither at once, and consequently that his period of residence at that place would commence within a short period, namely, as soon as he should arrive there; but there is no stipulation that he shall proceed to Belize and commence his residence there immediately. By the terms of the agreement, permission is given to Mr. Stirling 'to proceed to and reside at Belize aforesaid, and for the time aforesaid, and for so long thereafter as the extra premium shall from time to time be paid, along with the premium payable on this policy.' It is true that that language is somewhat ambiguous; and it is doubtful whether the words, 'for the time aforesaid,' have reference to the proceeding to, as well as the residence at, Belize, or only to the last part of the sentence. I am inclined to think, taking this expression in conjunction with the subsequent words, 'and for so long thereafter as the extra premium shall from time to time be paid,' that it has reference to the residence only, and not to the time consumed by the voyage. But admitting that there may be some doubt as to this, I think we are entitled to look at the recital to ascertain the meaning. That recital is as follows:—'The life assured under this policy being about to proceed to and reside at Belize, in the state of Honduras, and an extra premium of twenty guineas having been paid for the extra risk for such residence for one year,' &c. Now, that in terms excludes the time to be occupied in the voyage out. I think the terms of the permission must be construed by that recital; and the effect of the whole is, that the person insured was to have twelve months' residence at Belize, independently of the time occupied by the voyage. It is said that that period is to date from the 23d of June, 1853: br

there is nothing to be found in the contract to define the period from which the twelve months' residence is to date. * * They have not, however, done so here; the permission is given simply for a twelve months' residence at Belize, without specifying any period from which that residence is to date. This instrument, being the language of the company, must, if there be any ambiguity in it, be taken most strongly against them; and there is nothing to show that the agreement is necessarily to date from the 23d of June, 1853. Upon the whole, I think that the twenty guineas having been paid for the permission to reside for twelve months, the residence might take place at any time."

Willes, J., says: "Both parties were evidently under an impression that Mr. Stirling intended to proceed to Belize within a reasonable time after the permission was granted. The company expected that, and that the policy would practically be on the life of a person going to reside there within a short time. That, I quite see. If the company had taken care to embody that intention in an express stipulation, it would have been a condition, and would have placed the matter beyond all doubt. They have not, however, done so. They merely recite that the life assured is 'about to proceed to and reside at Belize, in the State of Honduras,' which can only mean that he *bona fide* intends to go. They then go on to say, that, 'an extra premium of twenty guineas having been paid for the extra risk of such residence for one year, permission is hereby granted to the life assured, to proceed to and reside at Belize aforesaid, and for the time aforesaid.' That necessarily implies that the party was to be at liberty to take the voyage. The only use of the expression, 'about to proceed to,' &c., is, to control the permission afterwards given. The license stands, therefore, as a clear license to reside at Belize for a year, in consideration of the payment of the twenty guineas. The stipulation is not expressed in such a form as to induce the court to hold it to amount to a condition."

§ 212. A permission to pass by sea, in first class decked

vessels, allows the insured to go as a steerage passenger in such a vessel.[1] The court, it is said, do not know, judicially or otherwise, that life is less safe in the steerage than in any other part of a vessel. Where a permit was given "to proceed to Cuba, and return before April 1, 1871, he to take his own risk of death from epidemics," and the insured died in Havana of yellow fever in February, 1871, it was held[2] that the company was liable, because yellow fever does not usually exist as an epidemic in Havana in winter, and did not exist as such at the time of the sickness and death of the insured. The court say: "The company evidently did not intend to stipulate solely against diseases which usually assume an epidemic character. It meant to stipulate, and did stipulate, for exemption from liability in case of death from any disease, however simple and harmless, under ordinary circumstances, at home, that might, by any possibility, prevail in Cuba to an extent which could be called epidemic."

§ 213. **Permit must be Strictly Complied with.**—Where a policy forbade the insured to pass beyond the settled limits of the United States, but permission was given "to make one voyage out and home to California in a first rate vessel, round Cape Horn or by Vera Cruz," and the insured went to California and returned home, not by way of Vera Cruz, but by the way of Panama and Chagres, and died a month afterward, it was held that the policy was forfeited, though it was agreed that at the time there was no usually travelled route by way of Vera Cruz, that in his state of health a return home by that route would have been attended with great risk and expense, while the route actually taken by him was the shortest and safest.[3] The court say, "This is not a general license, but a carefully defined and restricted permission. The company were under no obligation to give any consent. It depended entirely upon their own will, and

[1] Taylor v. Ætna L. Ins. Co. 13 Gray, 434.
[2] Pohalski v. Mut. L. Ins. Co. MSS. N. Y. Superior Ct.; affirmed in Ct. of Appeals.
[3] Hathaway v. Trenton M. L. & F. Ins. Co. 11 Cush. 448.

upon a new bargain to be made, whether they would give or withhold it. In yielding it, they had a right to fix their own terms, and to circumscribe it within such limitations as they deemed expedient. In this case they did exercise that right. They determined and declared how far they would relax the stringency of the condition. To the extent conceded him, the assured was relieved from its obligation and effect. He was allowed, without infringing the contract or incurring the consequences of a breach of its condition, to make one voyage to California out and home, in a first rate vessel. But he was restricted to two routes. He was given the choice of the voyage round Cape Horn, or the passage by Vera Cruz. He did not avail himself, as he might safely have done, of either of these routes, but returned from California by way of Panama and Chagres. For that departure from the settled limits of the United States, and the transportation of himself into those places, no consent was given by the defendants; and therefore it was a breach of the condition, which rendered the policy void. It is of no consequence that the route home taken by the assured was, or may have been, as the plaintiff offered to prove, the safest and shortest. The policy excluded him, if he would avail himself of the provisions and of the assurance contained in it, from being governed by what was advisable and expedient. It fixed the terms upon which the promise should be binding, and upon which it should be annulled. By those terms the parties are bound. There having been a breach of the condition, the contract is thereby rendered void."[1]

Where the body of the policy provided that it should be void if the insured went out of Europe without consent, but there was on it a memorandum that "It is hereby agreed that the life assured by this policy shall have permission to reside in any part of North America, to the northward of thirty-six degrees and thirty minutes of north latitude, but not to the westward of the Rocky Mountains, and likewise,

[1] In Leonard v. Eagle L. & Health Ins. Co. 4 Livingston's U. S. Law Mag. 286, there was a permit to travel and reside in a certain region, but no question arose as to it.

from the first day of November to the first day of July, to travel and reside in any place in the United States south of the above limits, but not to the westward of the Rocky Mountains; also, to pass in decked vessels, in time of peace, from any one port of Europe to another, from any part of North America to another, within the above limits, and between any European port and any North American port within the said limits, anything herein contained to the contrary notwithstanding;" it was held[1] that the policy and memorandum must be construed together, and were to be considered as containing a condition that would read as follows: "Provided also that in case the said assured shall at any time depart beyond the limits of Europe, excepting in travelling or residing in any part of the United States to the northward of thirty-six degrees thirty minutes north latitude, and in any part south of that line between the first day of November and the first day of July, then and in such case this policy shall cease and be void," &c. Such a policy by its terms prohibits the assured from travelling or residing in any part of the United States south of thirty-six degrees thirty minutes north latitude, between the first day of July and the first day of November, of any year during the life of the policy.

In the receipt given for the first premium, which was paid at the time the application was made, was a permit dated Oct. 22, 1863, that "It is understood and agreed that said George B. Waldron has permission to proceed, by first class vessel, to New Orleans, on and after this date." The insured sailed on Oct. 24, 1863, from New York to New Orleans, and thereafter resided there until Aug. 23, 1864; returning to New York on Aug. 31, 1864. The company claimed that the policy was violated by this residence in New Orleans, and refused to be bound by it, and to receive any further premium. The insured died in February, 1865, from disease of the brain, which first showed its commencement November 1, 1864. It was held, that the permit was a tem-

[1] Rainsford v. Royal Ins. Co. 33 N. Y. Superior R. 453; affirmed in Court of Appeals, 9 Alb. Law Jour. 50.

porary condition or contract to enable the assured to proceed to New Orleans, between its date (October 22) and November 1, that being a time that the agent of the company and the assured assumed would be prohibited in the policy when issued; that no reasonable construction of its terms would extend it as a permission to reside south of the proscribed line, and that its utmost limit of construction would only permit the insured to proceed to New Orleans after its date, and to return north of the proscribed line before July 1, of the next year.

§ 214. In Forbes v. American Mutual Life Insurance Co.,[1] it appeared that the policy, on which the ordinary premium was paid, described the insured as an inhabitant of Valparaiso. It had indorsed upon it a permit "to voyage to and reside at Valparaiso" for one year, and "to continue said residence thereafter without prejudice to said policy, on payment of dollars, annually, in addition to the regular premium." In fact, he paid no additional premium. After the departure of the insured, the plaintiff, without his authority, accepted a further permit, which provided that on payment of $67.50 the insured should have permission "to voyage to and from the United States and Chili, South America, and reside in Chili," and "this permit is to take effect when its conditions are complied with, and this permit is countersigned." It was contended that this latter permit became part of the contract, and not having been complied with, the insurance was vitiated. The court say, "But the ground of objection to the plaintiff's recovery, chiefly relied on by the defendants, is this: that Smith had no right, under the contract, to reside at Valparaiso without the payment of an additional premium, which was not paid for the year 1854, and that the policy thereby became void, and the liability of the company ceased. By the policy the life of Smith is insured as an inhabitant of Valparaiso, and in the application for insurance, which is referred to by a

[1] 15 Gray, 249.

proviso upon the policy, stating that 'this policy is made and accepted in reference to the application and declarations made to this company, which are to be used and resorted to to explain and protect the rights of all the parties,' his residence is declared to be at Valparaiso. It is also noticeable that there is, in the policy and conditions of insurance, no prohibition of travelling to or residing in South America; that no statement or declaration in the application shows that such a prohibition was in the contemplation of the parties; and that, if any restriction upon the liberty of the person whose life was insured, to reside or travel anywhere at his pleasure, excepting in and to the places specifically enumerated in the printed proviso, was created under the contract, it must be derived by implication from the permission to travel to certain places named, or from the indorsement upon the policy. Such an implication would, indeed, be a reasonable one, because it is obvious that a permission to go to certain places named, would be without reason or effect, if the contract already allowed the person insured to go, not only to those places, but to any others. But we cannot think that such an implied restriction, derived from a printed clause, should be allowed to control the direct meaning and purpose of the policy to be gathered from the written parts of that instrument. An insurance upon the life of Smith, as a resident of Valparaiso, for a premium agreed on, gave him a right to reside there without further permission or payment. The indorsement upon the policy of a permission to reside there upon the payment of a sum not named, leaving a blank for the amount not filled up, and delivered intentionally in that condition, cannot operate to deprive the party insured of a privilege for which he had already, in the completed parts of the instrument, contracted and paid. Treating the indorsement, therefore, as a part of the contract at the time the policy was delivered, we are of opinion that the plaintiff was under no obligation to pay any sum for the privilege of residence at Valparaiso. * * * The permit, which was issued in January, 1853, was not

granted by the defendants in pursuance of any contract made by the parties, and is shown to have been accepted by the agent of the plaintiff, without authority from his principal to do any act to modify or change the contract already made, and under a mistake of fact. It cannot, therefore, be resorted to to diminish the privilege of foreign residence before granted, or to subject it to any new condition; and the money, having been paid by mistake, may be recovered back in this action."

§ 215. **Waiver by Receipt of Premium.**—One mode in which a waiver of this as of other conditions occurs, otherwise than by an express permit, is, where the company receives a premium after a breach has occurred, of which it either is actually informed or is bound to be informed. In the case of Wing v. Harvey,[1] the policy contained a condition avoiding the policy, if the assured went beyond the limits of Europe, without the license of the directors. The condition was infringed by his going to Cànada, where he died; but for fourteen years after this breach of condition, the assignee of the policy paid the premium regularly to a local agent of the company, who knew of the breach, and informed the assignee it would not invalidate the policy if the premiums were regularly paid. It was not certain that the home officers of the company knew of the breach, though there was some evidence to that effect. It was held by the Lord Justices, that, as the company had received the premiums from their agent, they could not insist upon the clause of forfeiture, and that it made no difference whether at the time of receiving them, they knew of the forfeiture or not. They were bound to inform themselves.

§ 216. **Waiver from Acquiescence.**—On a policy forbidding the insured to pass beyond the settled limits of the United States, there was, in consideration of an extra premium, indorsed at the time of its issue, in 1849, a permit "to pass by

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[1] 5 De G. M. & G. 265; s. c. 27 Eng. Law & Eq. 140. See also Hodsdon v. Guardian L. Ins. Co. 97 Mass. 144. As to waiver by receipt of premium, see *ante*, § 194.

sea, in decked vessels, from any port in the United States, north of the thirty-sixth degree north latitude, to and from any port in North or South America, Chagres excepted, and to reside in California and country adjacent, for the term of one year from the date hereof." The indorsement also provided that, in consideration of the annual payment of an extra premium, "in every year during the use of this certificate, the insured is permitted to continue so to pass by sea, and reside, as aforesaid, without prejudice to this policy." The assured went, in 1849, by vessel from New York to Vera Cruz, thence across Mexico to San Blas, and thence by vessel to San Francisco, arriving in good health. Some of the officers of the company were informed, when he was being examined, that he intended to go by this route. The regular and extra premiums were paid, from 1849 to 1852, when the insured died in California. The court held[1] that the company was liable, saying: "The warranty alluded to is, that Barstow had, by the policy, no right to go out of the United States, and that he only obtained leave to go to California, and reside in a particular way, 'to pass by sea, in decked vessels, from any port in the United States, to and from any port in North and South America, Chagres excepted, and to reside in California.' The defendants insist that he went across the country, whereas he should have gone round the Cape. We are unwilling to yield to this objection, so entirely foreign to the merits of the claim, unless compelled to by the clear import of the license given; for Barstow reached California in perfect health, in due time, and had resided there some three years, when he died of a sudden sickness, unconnected with his passage across the country. * * It appears that, before the policy was filled up, the company were told that Barstow was going across the country; and afterwards they knew he had so gone, and reached California in safety. They knew, too, he was residing there, and from year to year, for three years, they suffered the plaintiff to pay the entire enhanced premium

[1] Bevin v. Conn. Mut. L. Ins. Co. 23 Conn. 244.

for such residence there, upon the idea that the insurance was still in force. They were willing then to overlook the breach of warranty, if any it was, and they virtually renewed the insurance, by taking the entire premium until Barstow's death. Now, between man and man, in any ordinary transaction of business, such an objection would create surprise, and we should say it was unreasonable and untenable, and that this subsequent taking of the premium was a complete waiver of the objection, even if well founded at first. Suppose the plaintiff had warranted that Barstow should sail by the first of January, and he did not until the fifth, but reached California in health, and after that the company had received the stipulated premium, for years, with full knowledge of this fact, while he was residing there under the permit, would they not be liable on the policy? To prove the knowledge of the defendants, the parol evidence was offered, and as, we think, very properly, not to explain or qualify the written contract, there being no explainable ambiguity, but to prove that the defendants had knowledge, at all times, of the fact, that Barstow went to California across the country, and that they subsequently acted in view of such knowledge, inducing the plaintiff to continue to pay premiums."[1]

§ 217. In one case it has been held that there may be circumstances in which the company is liable, though the insured die at a place where, at the time, he is forbidden to be.[2] The policy provided that it should be void if the insured should, without the consent of the company, go south of Virginia and Kentucky; but the company by successive indorsements gave permission, in 1849, "to reside and travel inland in any part of the United States, or by any of the regular steamers, to be north of the south bounds of Virginia by the 10th day of July, 1850," and in 1850, "to remain in Apalachicola, Florida, until the 1st of August next, to be

[1] As to waiver of condition against travel, see Girdlestone v. North Brit. Merc. Ins. Co. 11 L. R. Eq. Cas. 197; s. c. 40 L. J. Ch. 230.

[2] Baldwin v. N. Y. L. Ins. & Trust Co. 3 Bosw. 530.

north of the south bounds of Virginia by the 10th of August, 1850," and in 1851 and 1853 gave permits similar to that of 1849, the last one requiring the insured "to be north of the south bounds of Virginia by the 10th of July, 1854." The insured went to Florida, where he was taken sick on June 11th, 1854, and was unfit and unable to travel all the time till July 20, 1854, when he died in Florida. The court held that the company was liable. Hoffman, J., says, "The case then is thus presented. The life of the plaintiff's intestate was insured by the contract while he remained within certain territorial limits. If he went beyond those limits without consent the policy was to be void. Then the consent modified the restriction, permitted him to go within the before prohibited limits, but required that he should return from within them by the 10th of July, 1854. I treat, then, the legal scope and import of the contract as stringent as it can possibly be treated, when I regard it, as if on the 23d of October, the parties had made the insurance, giving liberty to the assured to go and remain south of the specified bounds down to the 10th of July, 1854, and declaring that the policy should be void if he was not north of those bounds by that day. The license, then, would be accompanied with a provision, or stipulation, or condition, whatever may be the proper term; and so here, the relaxation of the original prohibition is accompanied with the same modification attached to it. The learned counsel of the defendants insists that there is a condition precedent here, which must be literally and absolutely fulfilled before a recovery can be had. He must, upon the theory he advocates, sustain a proposition like this: that the agreement was, that the company would be liable, if death occurred within the specified limits, between the 23d of October, 1853, and the 10th of July, 1854; or, beyond those limits at any other period of the year; but in no other event. The occurrence of death, under one or the other of these contingencies, was the *casus fœderis*, a condition precedent to any liability. That the whole instrument, the policy and indorsement taken together, admits

of such a construction, may not be doubted; neither can it be questioned that no particular form of words is necessary to constitute a condition precedent. * * The distinction is considerable, between language defining the case of a liability and excluding expressly every other case, and words simply declaring that unless a party was beyond a certain place by a given day the assurers should be exempt. I think the consent is to be regarded as a qualification, and a qualification upon terms. Assume that those terms substantially amount to a proviso or condition, it is not one inflexible, arbitrary, and incapable of exception, or of anything short of literal performance. Full license is accorded to be within the before excluded limits for the period mentioned. There is an obligation imposed upon the party to return; there is an implied stipulation on his part to return; treat it as in substance a condition that he should return; and yet there is not the absolute exclusion of every possible excuse for not returning by the day fixed. If so, we come to the question whether the facts found by the special verdict are sufficient to dispense with the literal fulfillment of what is now treated as a condition. It admits, indeed involves, the idea of an intention to return within the period prescribed. It is found that Baldwin's not being north of the boundary was solely caused by the illness which resulted in his death. And we see that, when his inability to travel commenced, he had twenty-nine days to perform a journey which required but six." After a careful examination of cases[1] he concludes that, "they establish, that an inability short of absolute impossibility, may exempt a party from his liability under a contract, if this inability result from the act of God. The rule laid down in the other cases is not then imperative, and without exception or qualification. In some instances at least, that which amounts to an act of God creates an exception. After a careful examination, I have not been able to find a decision in which the distinction suggested by

[1] Especially Taylor v. Bullen, 6 Cow. 624; People v. Manning, 8 Cow. 297.

Chief Justice Spencer[1] has been acted upon in a case similar to the present; where, though the events, amounting to an act of God, would have constituted a defence had Baldwin or his estate been in the position of a defendant, they form no ground for supporting a claim. Had there been a penalty to be paid by the assured, for an absence beyond the day, it is clear he would have been exempted from it. I do not see any satisfactory reason for the distinction referred to in a case like this. Had the condition been so positive and explicit as to preclude any exception, my views would have been different. But the language of the provision admits of the reasonable construction, that absolute inability to return by the day prescribed, from accidents consistent with the attempt or fixed intention to return, may be treated as a contingency within the view of the parties, and the contract be subjected to such contingency. If it be urged, 'why then did not the assured provide for it?' the reply may be, 'why did not the insurers use language which would preclude the possible exception?' My conclusion is, that in a life policy, where the performance of such a condition or provision as exists in this case, rests with the assured exclusively, which does not admit of his employing any agency, but is wholly personal, and he is disabled from performance by the act of God, without neglect or default of his own, but with the intention to perform literally, the condition is saved, and the insurers are liable. I consider, also, that the death which here took place, was a death from the act of God. 'It was something in opposition to the will and act of man.'[2] I have considered this case precisely as if in the license or consent of the 24th of October, 1853, the words had been 'provided,' or 'upon condition that he be north of the south bounds.'" Bosworth, C. J., says, "James J. Baldwin, the insured, was taken sick at Apalachicola, in Florida, on the 11th of June, 1854. If he had died there, before the 10th of the following July, of the

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[1] Moakley v. Riggs, 19 Johns. 69.

[2] Lord Mansfield, Forward v. Pittard, 1 T. R. 27; Oakley v. Port of Portsmouth, 34 Eng. Law & Eq. 530.

disease with which he was attacked on the 11th of June, the defendants would be liable on the policy. So, too, if he had started north, in time, and so as to have passed north of the south bounds of Virginia by the 10th of July, and had died north of such bounds on the 11th of July, the insurers, on the principles contended for by them on the argument before us, would have been liable, even though such a journey, performed under such circumstances, diminished the insured's chances of recovery. Under this construction of the license granted to the insured, the latter, in order to keep the policy in force, if taken sick in Florida on the 11th of June, must start north, at whatever peril to his life, in time to be and succeed in being north of the south bounds of Virginia, a living man, by the 10th of July. If he does not, this policy would become void. And this consequence follows, although there be the highest moral certainty that if he performs the journey his disease will be thereby so aggravated that his death will be inevitable, and the company made liable to pay the sum insured. Hence, if that is the proper construction of the license or consent, the insured, if taken suddenly ill, when he has five times as long a period remaining as is ordinarily required to perform the journey, must, although there may be a reasonable prospect of his restoration to health by a day subsequent to the 10th of July, if he continue where he is, either forfeit his policy if he remains there, or earn the sum insured by terminating his life, before the 10th of July south of the south bounds of Virginia, or north of them immediately thereafter, by reason of the rash and hazardous attempt to perform such journey. In other words, under such a state of facts as the evidence in this case established, in order to keep the policy in force, the insured must do acts which will unavoidably subject the insurers to a loss of the sum insured, and thus literally 'die by his own hand,' in which event, the policy by its terms becomes void. If the insured, when taken sick, had been north of the south bounds of Virginia, but absent from his home, and the nature of his disease and its aggravated condition were such, at

the time, as in the judgment of those conversant with such subjects, death would inevitably ensue if he should attempt to journey home, while his recovery would be, in the highest degree probable, if he continued where he was and submitted to the regimen prescribed by competent professional advisers, and he should nevertheless, against such advice, persist in the attempt to journey home, and by reason of it, should die on the way, his conduct would fall within the spirit of the condition last referred to, though it might not within the letter of it, as it has been judicially interpreted.[1] On such a state of facts, it would be difficult to say that the death of the insured was not caused by his own default or neglect. As the policy in question is one upon the life of the deceased, I think the terms of the license or consent should be so construed as not to require him to attempt to return north of the south bounds of Virginia by the 10th of July, when, in consequence of sickness suddenly and unexpectedly contracted or developed, an attempt to do so would be certain, so far as the human mind can foresee results, to produce the death of the insured. By the ordinary route and mode of travel he could have passed from the place where he was taken sick north of those bounds in six days. Excluding the 11th of June, on which day he was taken sick, and the 10th of July following, there were twenty-eight days remaining. He was taken and became 'so sick and ill in body as to be unfit and unable to travel, and to start on his return home,' and continued so until he died. I do not think the consent or license should be so construed as to require him to start in that condition, with the certainty that, if he did start, he would die in consequence of his sickness, and of such acts on his part south of the south bounds of Virginia before the 10th of July, or north of those bounds immediately thereafter. That it could not have been the intention of the parties to this contract that the insured, under the state of facts established by the special verdict, should do acts which would make his own death inevitable,

[1] Breasted v. Farm. L. & T. Co. 4 Seld. 299; Parson's Merc. Law, 544, note 1.

in order to a proper performance, on his part, of his duty, as prescribed and declared in such license or consent. That, by a just construction of the policy, he was insured against death resulting from a disease contracted or first developed on the 11th of June, 1854, at the place where he then was, if the disease was of a character that his death was in the highest degree probable if he attempted to travel. And that, his being north of the south bounds of Virginia by the 10th of July, 1854, is not a condition precedent to the right to maintain an action upon the policy in case of his death, in such sense, that, if in consequence of sickness, discovered on the 11th of June (at a distance from such bounds of six days' ordinary travel), and so severe that his death will be in the highest degree probable if he attempts to travel, the insured must endeavor to reach these bounds, with the certainty, that if he does, he will die before the 10th of July and before crossing them, or as soon as he has passed north of them, either on the 10th, or immediately thereafter. The consent or license should be so construed as to conform to the intent of the parties, to be collected from the terms of the whole agreement, and the subject-matter to which it relates. I think it was the intent of the parties that the defendants should be liable, in the event that has happened, and on its happening under the circumstances under which it is proved to have occurred." It is perhaps to be regretted that this case was not carried to the court of last resort.

§ 218. **Death in the Known Violation of Law.**—Another usual condition avoids the policy if the assured dies "in the known violation of any law." This condition has been the subject of several judicial decisions. It is held in Massachusetts,[1] that it must be construed to refer to a voluntary criminal act on the part of the assured, known by him at the time to be a crime against the law, but that it does not extend to a mere trespass or other infringement of the civil law, to which no criminal consequences are attached. In a case in

[1] Cluff v. Mut. Ben. L. Ins. Co. 13 Allen, 308.

that State, which was tried four times, the court say,[1] "In the opinion of the court, the condition that the policy should be null and void, among other grounds, in case the insured should die 'by the hands of justice, or in the known violation of any law' of the State or country where he resided or which he was permitted to visit, must be construed to refer to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of such State or country. Applying the maxim *noscitur a sociis*, and remembering that such a clause ought not to be so interpreted as to work a forfeiture, unless that intention is apparent, as well as from the natural import of the words, 'known violation of law,' we conclude that they do not extend to mere trespasses against property, or other infringements of civil laws to which no criminal consequences are attached. Robbery, larceny, and an assault upon the person of another, which are criminal offences by the common law and the laws of all civilized countries, must be presumed to be crimes against the laws of Louisiana. And the ordinary presumption applies to this case, that every person, intelligent enough to be a subject of punishment, must be presumed to know the criminal laws of the government under the jurisdiction of which he is found. The forcible taking of the horses from Cox, if done under an honest claim of right, however ill founded, would not constitute the crime of robbery or larceny, because where a party sincerely, although erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes. Neither does the taking of horses from a vehicle to which they are harnessed, amount to an assault upon the driver, unless accompanied by violence or threats of violence against him. * * Either an assault or battery would be a crime within the condition of the policy, unless justified as a measure of necessary self-defence. To apply these principles more closely to the circumstances of the homicide of Cluff, as narrated in the depositions, which

[1] Cluff v Mut. Ben. L. Ins. Co. 13 Allen, 308.

were the only evidence at the trial, we find in the account given by Bugbee, no statement of any assault committed by Cluff, previous to the firing of the pistol. He appears only to have endeavored to unharness and take away the horses, under his claim to hold them as security for debt, and neither to have done nor threatened any injury to the person of Cox. In the deposition of Scott, however, a different account of the transaction is given, according to which Cluff was guilty of an assault and battery. His attempt to take away the horses was forcibly resisted by Cox, who 'grabbed him by the throat.' Cluff then struck him, making him stagger. This blow does not appear to have been by way of self-defence, but in the furtherance of the design to obtain the horses. It was, therefore, according to the version of this witness, a criminal assault, even if Cox also committed an assault by using undue violence in resisting the attempt of Cluff. But the jury may not believe the narrative of either deposition to be precisely accurate, and the question, whether Cluff was guilty of an assault, must be submitted to their consideration upon all the evidence which may be produced at another trial. Assuming that Cluff did commit a criminal assault, it may not necessarily follow that he died in the known violation of the law. If he was shot while the assault continued, such would be the case. But if it had ceased, and Cluff was not threatening to renew it, and Cox had withdrawn out of his reach and then shot him, not in the course of the affray, but merely to revenge himself for what had been done, or to prevent the seizure of the horses, then, at the time he was killed, Cluff was not engaged in a known violation of the law, within the meaning of the policy. For he must have received the mortal wound during and while engaged in the commission of a crime, not merely in consequence of it afterwards. But the jury, upon all the evidence, should consider whether, if he is proved to their satisfaction to have been once engaged in a criminal assault, he can be deemed to have desisted from it, while persisting continuously in the very act in the course of which the affray oc-

curred. Their attention should be called distinctly to the question whether, if Cluff had committed a criminal assault, it was so far ended when he was fired upon that the fatal shot is to be regarded as a new and independent event, rather than a mere continuation of the original affray. If Cluff committed a criminal assault on Cox, which the latter immediately returned by a fatal blow, then the death would have been occasioned in a known violation of law, although the jury might believe that Cluff was not at the moment intending to commit any further assault. The question to be considered is, were the two acts—the assault by Cluff, and the firing of the pistol by Cox—a part of one conflict for the possession of the horses, or had Cox abandoned his attempt to retain the custody of the horses, and had Cluff desisted from his assault? Was the fight over, or had Cox merely retired to a more advantageous position? In short, if Cluff in the first instance did commit a criminal assault, and the firing of the pistol was a part of the same continuous transaction, then the condition of the policy was violated. It must also appear that the death was caused or occasioned by or resulted from the criminal act. The loss of life must be connected with the crime as its consequence. By reason of the guilty act, the death must have occurred, so that without its commission it would not have taken place. In the opinion of a majority of the court, it is not, however, essential that the deceased should have known, or have had reason to believe that his criminal act would or might expose his life to danger. The fact that the crime actually did produce the death, is sufficient to avoid the policy, without regard to the probability that such a result would ensue."

The court further say on a subsequent trial:[1] "Among the points already decided are: 1st. That 'violation of law' as used in this policy, means crime; and 'known violation of law' indicates a voluntary criminal act. 2d. That offences against the person or property of another, such as are recognized and treated as crimes by the common law,

[1] 99 Mass. 317.

and the laws of civilized countries generally, will be presumed to be crimes in Louisiana. 3d. That the burden of proving that the insured died in the known violation of law is upon the defendants. 4th. That Cluff must be presumed to know the criminal laws of the government under the jurisdiction of which he was. The testimony in regard to the circumstances under which Cluff met his death tended to show that he was engaged in the commission of acts which would constitute either robbery or larceny, unless he acted under a belief that he had some legal right by which his conduct would be justified. Whether the two depositions, from which the whole testimony upon the subject was derived, furnished evidence that he acted under such a belief, seems to have been a point of contest. There was no evidence of any title or claim of title; nor any direct evidence of the existence of a right of lien. The depositions show that Cluff made the claim of a debt due him from the owner of the horses; and that he declared his purpose to take the horses to pay it. Neither deposition states that Cluff, in words, set up any right of lien, or other legal right to hold or to take the property of Cox. But the deposition of Bugbee indicates, inferentially, that Cluff might have supposed that the horses could legally be held as security for his debt, inasmuch as it was claimed to have arisen from the keeping or feed of the stock upon the plantation of which Cluff was lessee. * * Too great latitude was allowed for the jury to take into account any loose opinions of right which they might have supposed Cluff to have formed. It would seem to permit a mere opinion or theory of abstract right, which the jury might think Cluff had come to entertain honestly, and chose to act upon regardless of positive law, to exempt him from criminal responsibility. A claim of right which can have this effect must be a claim of legal right. It is not enough that it be asserted. There must be a real and not a pretended belief that such legal right exists. It involves more than a belief in the right to disregard law for the purpose of self-redress. * * The instructions * * should therefore leave no

doubt in the minds of the jurors, that nothing less than a claim of legal right, or an authority of law, was intended. * * The burden is upon the defendants, as has been already decided, to satisfy the jury that the act of Cluff which occasioned his death was a voluntary criminal act. This requires the defendants to overcome any inference, which may be drawn from the testimony, that, in attempting to take the horses, he acted under an honest belief that he had some legal right or authority which entitled him to take them. But if the defendants should be able to satisfy the jury that Cluff had no color of title or right in or to the property, nor of legal authority to take it, and that he made no claim of any such title or right, nor of any authority, except that, having a debt against the owner of the horses, he claimed a right to seize his property in payment, by way of self-redress without regard to law, we think the defendants would then be entitled to a verdict. Such a claim would be a claim of the privilege to commit a crime, which the law will not recognize to be honestly made as a claim of right. * * As the case was left by the last trial, it would appear that the verdict may have been rendered for the plaintiff, although the jury were satisfied that Cluff had no pretence of any title, lien or other right, nor of any legal authority, merely because they supposed that he might have entertained an honest belief or opinion that in consequence of the state of the country and the want of efficient administration of the laws, he had a good right, from necessity or otherwise, to take redress into his own hands without regard to law."

§ 219. It has been held in Missouri,[1] that the policy is not rendered void if the assured was killed after voluntarily retiring from an altercation, which he had commenced, under circumstances which would make his slayer guilty of a felonious homicide. The court say: "The answer sets up the defence that Harper died in the known violation of a law of this State, in committing an assault upon one Coryell, whereby the policy was avoided; that Harper, just before his

[1] Harper's Admr. v. Phœnix Ins. Co. 18 Mo. 109; s. c. 19 Mo. 506.

death, assaulted Coryell with a pistol, and attempted to shoot him, who, in resisting said attempt, and in defence of his life, shot and immediately killed Harper. The court say,[1] 'When this cause was formerly here, the idea intended to be conveyed in the opinion given, was that a person could not be said to have died in the known violation of a law of this State, when a crime attached to the individual by whom he was slain. It was not supposed that, therefore, it followed, that in all cases, when the killing was without crime, that the person slain died in the known violation of the law. We see no reason to change the opinion then hazarded. * * * We must, then, as in all other cases involving the construction of contracts, look to the intent of the parties, as gathered from the instrument embodying their minds. It is obvious that, in giving the words of the condition a literal meaning, cases will be embraced which no one will maintain were in the contemplation of the parties. If the person whose life is insured uses offensive language to one whilst they are engaged in an unlawful game of chance, which language is concerning the game, and he is shot down for the provocation, it would not be maintained that he died in the known violation of the law of the land, within the meaning of the contract. So, if he is riding a race in a public highway, which is forbidden, and his horse falls, and he is thrown, and his neck broken, he does not die in the known violation of a law of the land, within the meaning of the terms of the condition. So, also, in a quarrel, if he assaults another with his open hand, and is thereupon instantly shot down, he does not die in the known violation of a law, within the intent of the policy. Many similar instances might be put, which it is clear, were not within the meaning of the parties, and, if they were, the contract would be much narrowed in its operation. If, then, the literal use of the words of the policy leads to conclusions which are inadmissible, we are necessarily driven to some other mode, in order to ascertain the meaning of the parties. In the interpretation of contracts of insurance, the

[1] 19 Mo. 506.

maxim *noscitur a sociis* obtains. When a clause stands with others, its sense may be gathered from those which immediately precede and follow it. The clause in the policy which immediately goes before that under consideration is, 'if the party shall die by the hands of justice.' Now do not these words clearly indicate the idea in the minds of the parties at the time? Do they not show that it was a justifiable killing? There are other modes of killing justifiable, than by the hands of justice. Dying by the hands of justice means dying by the execution of the sentence of the law. * * Here are abundant instances in which the words of the condition can have play, without resorting to a latitude of construction which so extends its sense as to embrace cases which were never in the contemplation of the parties. As there was but one mode of justifiable killing expressed, it was necessary to use general words to include all other modes of such killing, as they were equally within the meaning of the contract. The other clause in the condition is that, if the party shall die in consequence of a duel. If a man falls in a duel, his slayer is guilty of murder. A duel is a deliberate act, and the parties voluntarily, in violation of law, expose themselves to death. The kindred clauses of the condition thus show that a dying in consequence of a felony, then in the very act or course of being committed by the insured, and a dying in consequence of a felony previously committed by him, were in the contemplation of the parties. Now it would seem that, upon the acknowledged rule of construction *noscitur a sociis*, that the last clause in the condition, being left in doubt as to its meaning, should be construed only to extend to instances in which the party died in the commission of a felony. * * The facts of this case clearly show that the person slaying Harper was guilty of a crime. There is no proof of the fact set up as a bar that Coryell slew Harper in self-defence. Harper had abandoned the conflict, retreated as far as possible, and endeavored to screen himself from the attack of his assailant. His having a stick of wood in his hand at the time he was slain, did not, in the least, extenuate the guilt of Coryell.

Under the circumstances, Harper would have been justified had he slain Coryell. This is made so by our statute. He would have been excused by the common law. * * If one dies under circumstances which would justify him in slaying his adversary, and when the person causing his death is, thereby, guilty of a felony, is it not a gross perversion of language to say that the person died in the known violation of a law of the land?'"

In another case in the same State[1] it has been more recently held that the policy is not avoided if the assured was killed while in the lawful defence of his person, when there was reasonable cause to him to apprehend a design on the part of another to do him great personal injury, and also to apprehend immediate danger of such design being accomplished.

§ 220. All of these cases in effect confine the phrase, "violation of law," to a criminal offence. But in New York a somewhat different rule is applied. In Bradley v. Mutual Benefit Life Insurance Co.,[2] a policy upon the same life insured in the case of Cluff against the same company[3] came before the Supreme Court of New York for adjudication, and apparently upon the same testimony. At the trial the court took the case from the jury, holding that there was no question of fact for them to pass upon, and nonsuited the plaintiff. On appeal to the full bench of the Supreme Court this decision was sustained. The court here say: "Two questions, however, are involved in the decision of this case, viz., whether the exception in the policy applies to any other violation of law than a felonious act, and whether the act in which Cluff was engaged was a violation of law under the laws of Louisiana." After deciding that in the absence of evidence to the contrary, the law of Louisiana must be presumed to be the same as that of New York, the court hold that the proviso is not to be restricted to violations of the

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[1] Overton v. St. Louis Mut. L. Ins. Co. 39 Mo. 122.
[2] 3 Lans. 341. [3] *Ante*, § 218.

law which are criminal acts, but that it extends to all acts in violation of law which would naturally lead to a conflict by which life would be endangered. On appeal to the Court of Appeals, however, this decision was reversed,[1] though there was a dissenting opinion. They held that there was a question of fact and conflicting evidence upon it which should have been left to the jury for decision. They say: "A difference of opinion exists between the members of this court as to whether the proviso applies only to violations of the criminal law, or whether it embraces all illegal acts of such a character as to lead to violence. But, independently of that question, and whatever be the nature of the violation of law urged by the insurance company as avoiding the policy, it seems to be clear that a relation must exist between the violation of law and the death, to make good the defence; that the death must have been caused by the violation of law to exempt the company from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that at the time of the death the assured was violating the law, if the death occurred from some cause other than such violation. * * It is not enough to say that if Cluff had not made the attempt he would not have been killed. The killing must have been a natural and reasonable consequence of the attempt, to warrant a decision that it was caused thereby. Cluff's going to Louisiana and his taking a lease of the farm were links in the chain of circumstances which ended in his death. If he had not done these things, he would not have been killed as he was. Yet it would not be reasonable to say that those acts were the causes of his death. * * The proximate, and not the remote, cause must be regarded. The immediate cause of death was the shooting, and if Cluff so conducted himself that the shooting was a natural, reasonable and legitimate consequence of his acts, then it may be said that they caused the shooting. But if Cox fired with intent to kill, and his act was wholly beyond the scope of lawful resistance to the trespass of Cluff, and the provocation

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[1] 45 N. Y. 422.

given by the latter was totally inadequate to excite or justify the character of violence which was used, and if the circumstances of the killing were such that rational men would attribute it to wanton malice, rather than to an endeavor to resist aggression, or even to natural indignation, then, although the deceased was in the wrong in the first instance, his wrong was but a remote and not a proximate cause of the death, and other causes, for which he was not responsible, intervened. * * The diversity in the statements of the witnesses as to the circumstances of the killing, and the necessity of an inquiry into the motive which actuated Cox, render it impossible to determine, as a question of law, that the killing was a reasonable or natural consequence of the acts of Cluff. So long as the evidence falls short of establishing that the homicide was legally justifiable, I can see no safe rule by which the court could be guided in deciding that the provocation proved was the cause of the killing, and in withdrawing that question from the consideration of the jury. The learned court in Massachusetts express the opinion that if Cox shot Cluff not in the course of the affray, but merely to revenge himself for what had been done, the case would not be within the proviso. This distinction is reasonable, and seems to be applicable whether Cluff's violation of law were criminal or not. If Cox abandoned the horses and started for his home, and afterwards changed his mind, turned, and maliciously shot Cluff, that was a new and independent event. There was some evidence to sustain that theory of the case." The court, therefore, hold that the case should have been submitted to the jury, "to determine, under proper instructions, whether the death of Cluff was caused by a known violation of law on his part, and whether the act of Cox which produced the death was a natural, reasonable, or legitimate consequence of the acts of Cluff. * * It would hardly be contended that if one should intentionally and deliberately kill another in consequence of some slight violation of a civil right, such as walking across his land without his permission, or other trivial trespass, the case would fall with-

in the proviso, for no one would hesitate to say that in the case supposed the unlawful act of the deceased was a totally inadequate cause for the killing. Yet, between such an act as that, and one which would in law justify the killing of the offender, there are an infinity of supposable cases, involving different degrees of provocation, which cannot be measured so as to determine as matter of law their adequacy to produce a fatal result; and it can hardly be laid down as a rule of law that an attempt to take one's horses for debt without process, but without any threat of personal violence, is of itself an adequate cause for intentionally killing the offender, and that a killing during or immediately after such an attempt must necessarily be held a legitimate consequence of the act. Such an act may lead to violence, and, if any act of violence of the character which would naturally be resorted to as a measure of resistance, should result in death, the necessary connection between the original illegal act and the death might be established. But the intentional killing of another with a deadly weapon under such circumstances is a totally different affair, and cannot be held as matter of law to be a natural or reasonable result or consequence of the original affair." The members of the court who dissent do so on the ground that the act of Cluff "was imminently calculated to lead to violence dangerous to his life, and also that of the boy," and that "the case was thus brought directly within the proviso."

§ 221. **Military and Naval Service.**—Another very common clause forbids the insured to enter any military or naval service. Provisions of this nature seems to be broader in the English policies than in our own.[1] In this country a policy

[1] Bunyon, p. 69: "A sixth condition is, 'if the assured shall enter into any military or naval service without previous license from the directors,' or, 'if he shall, without the consent of the directors for the time being, engage in the preventive service, or any seafaring occupation, or during actual warfare shall engage in any military or naval service whatsoever,' or, 'if he shall become a seafaring person, or engage in active naval or military service, or being or becoming a military man, shall be called into active service without permission from the directors.'" In this country, "the militia not in active service" is frequently excluded from the proviso. When are they in "active service?"

was issued, in 1864, with this clause, and also with a further one forbidding the assured from visiting those parts of the United States which lie south of certain limits, between certain days. Simultaneously with its issue, in consideration of an extra premium, consent was given that the assured might go to the excepted region and reside there or return within the period of one year, and providing farther, that the assured "is not insured by said policy against death from any of the casualties or consequences of war or rebellion, or from belligerent forces in any place where he may be."[1] As stated by the court, "Upon the facts of the case, there is very little room for dispute. The plaintiff's husband was killed in the State of Tennessee, and south of the line of the thirty-sixth degree of north latitude, by a roving band of banditti, thieves and robbers, such as infested all the border States during the war. The death occurring at such place and under such circumstances, clearly avoids the policy, unless it is covered and saved by the permit or consent indorsed upon the policy, of the date of September 17, 1864. By this permit, Welts was permitted to pass, by the usual route and means of public travel, to any part of the United States south of the thirty-sixth degree of north latitude, and reside there, or return, during the term of one year from the date of such permit, without prejudice to said policy; provided, and the said permit was issued with the understanding and agreement of the parties in interest, 'that the said Welts was not insured by said policy against death from any of the casualties or consequences of the war or rebellion, or from belligerent forces, in any place where he may be.' If this permit had not been given when all that part of the United States south of the thirty-sixth degree of north latitude was in a state of insurrection and war, and covered more or less with hostile armies, I should have considered that Welts came to his death from the causes covered by the proviso, and excepted

If called out by a State or municipal officer to quell a riot, guard a building, or escort a funeral procession, are they "in active service?"

[1] Welts v. Conn. Mut. L. Ins. Co. 46 Barb. 412.

from the policy. But he was permitted to go into any or all the insurrectionary States south of the line of the thirty-sixth degree of north latitude, the insurers well knowing, as well as the assured, of the existence of the war of the rebellion in all of these States. The assured paid an extra premium for such permit. He was killed where, under the permit, he had a right to be. He was not killed by rebels in any encounter of arms. He was engaged in no battle, or near any. He was twenty miles or more in the rear of the United States forces at Nashville, and it does not appear that there was any rebel force at the time north of the Cumberland. He was not exposed to any war peril, except such as existed through all the peaceful parts of Kentucky and Tennessee. Having the right to be in the place in which he was killed, the risk Welts then ran was one covered by the permit. He was engaged in no warlike enterprise. He was simply rebuilding railroad bridges far in the rear of, and away from, any hostile forces. The band by which he was killed, were, it seems, mere roving robbers, robbing Union men and rebels alike. They did not interfere with the work in which Welts was engaged. They did not destroy railroads or bridges, or make prisoners of any persons in Welts' company, or others. They merely robbed the members of the company of their money, making no demonstrations indicating that they were confederate soldiers, or acting in the interest of the rebel government. It is true that Welts ran the peril of encountering such robbers by going into Tennessee; but this, I think, was part of the risk contemplated by the permit. The same peril would have been encountered if he had been traveling quietly in that section of country, simply passing from one place to another in any part of the United States south of the line of thirty-six degrees of north latitude. This permit is to be construed with reference to the known condition of the country at the time it was given, and the parties must both be deemed to have known what the ordinary perils were in the country where the insured proposed to go, and their contract must be interpreted in the light of this assumption." The

decision was affirmed on appeal, the Court of Appeals holding[1] that even though the railroad was under a military director, and used for military purposes only, still one employed by the military authority in constructing bridges did not lose his character as a non-combatant, and could not be held to have entered the military service. "The general understanding of the term includes such persons only as are liable to do duty in the field as combatants. There is no evidence that the widow is entitled to a pension, as would be the case if her husband had perished in the military service of the United States during the rebellion." They also held that there was no evidence that he lost his life by the casualties or consequences of war, rebellion, or from belligerent forces. "The war or rebellion may be a remote cause of the death, as it was the cause of disorder and lawlessness; but the proximate cause is murder and highway robbery." They add: "The language used can be considered as including only death from casualties or consequences of war or rebellion, carried on or waged by authority of some *de facto* government, at least."[2]

§ 222. **Duelling.**—Coupled with the last condition is usually one against duelling. It has not, in its relations to life insurance, been the subject of any judicial decision. Mr. Bunyon says:[3] "It has been suggested that the question, as to the felonious intent might arise when the deceased, although killed in a duel, had fired his pistol in the air, and never contemplated shooting his opponent; but the reply to this might

[1] 48 N. Y. 34.

[2] Entering the military service is considered in the chapter on the Effects of War. I am informed in a letter from N. L. Freeman, State Reporter of Illinois, that at the February term of the U. S. Circuit Court held at Springfield in February, 1874, a demurrer to an action on a policy issued after the commencement of the rebellion was decided by Judge Drummond. The policy contained the usual clause against entering the military service, and one count in the declaration alleged that he did not voluntarily enter such service, but was drafted and compelled to enter it, and was killed in battle. A demurrer was sustained, the court holding that the policy embraced the entering the service in any manner, whether voluntarily or upon compulsion.

[3] P. 79.

well be that the office had stipulated, that he should not expose himself to such a risk; or again that the duel might be in the course of a war, in which it might be fatal but not felonious; but this case would seem to be covered by the condition as to military service."[1]

§ 223. **Death by the Hands of Justice.**—Closely connected with the last condition, is one usually inserted, which forfeits the policy if the insured dies by the hands of justice. No case has been found where such a clause has been the subject of judicial interpretation, but the clause does little, if anything, more than enunciate a rule of the common law which would be applicable without it. In a celebrated case,[2] in which there was no provision upon the subject in the policy, Fauntleroy procured insurance upon his life, which, it was held, was rendered void by his subsequent commission of a felony for which he suffered death. Lord Chancellor Lyndhurst,[3] in giving the decision in the House of Lords, said: "The question under these circumstances is this, whether the assignees can recover against the insurance company the amount of this insurance, that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted and finally executed, whether under such circumstances the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. * * Suppose that in the policy itself this risk has been insured against; that is, that the party insuring had agreed to pay a sum of money, year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted and executed for that felony, his assignees shall receive a certain sum of money, is it possible that such a contract could be sustained? Is it not void upon the plainest

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[1] See § 224.

[2] Amicable Soc. v. Bolland, 4 Bligh, N. S. 194; s. c. 2 Dow. & Cla. 1; overruling 3 Russ, 350, *sub nom.* Bolland v. Disney.

[3] In the note to the American edition of Ellis on Insurance, p. 193, this decision is erroneously ascribed to Lord Eldon.

principles of public policy? Would not such a contract, if available, take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections. Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended, that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a clause? Can we in considering this policy give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void!"[1]

§ 224. With reference to "death by the hands of justice," it has been asked,[2] whether it would be competent to the plaintiff to prove that the deceased was in truth innocent of the crime for which he suffered. In Clift v. Schwabe,[3] Patteson, J., says: "I apprehend that the actual felony is no part of the cause of exception from liability. If it were, it would be competent to the plaintiff to prove that the deceased, although dying by the hands of justice, was in truth innocent of the crime for which he suffered, * * or that the deceased, although killed in a duel, had fired his pistol in the air, and never contemplated shooting at his opponent. Such defences would surely be excluded, for the words of the exception are express, 'die by the hands of justice,' whether justly or not, 'or by duelling,' whether it were felony or not. It seems in truth that the exception is not framed with reference to the commission of any felony or crime, but to guard against the time for payment of the

[1] In Halford v. Kymer, 10 B. & C. 724, reference is made by Barons Bayley and Tenterden, to the case of Innes v. Equitable Ass. Co., tried before Lord Kenyon, in which the plaintiff, to prove an interest in his daughter's life, produced a forged will. The plaintiff was convicted of forgery and executed, while one of his witnesses was convicted of perjury. It would seem that in Read v. Royal Exch. Ass. Co. Peake Add. Cas. 70, the wife was accused of having murdered her husband in order to get the insurance moneys.

[2] Bunyon, 79.

[3] 3 M. G. & S. 436, 466.

sum insured being accelerated by the voluntary act of the party interested in the money." In a note to this case, the supposition is made of a case where the insured is executed after a reprieve or by mistake for another party, who is really under sentence of death.[1] In Borradaile v. Hunter,[2] Tindal, C. J., says, that "The dying by the hands of justice is a dying in consequence of a felony previously committed by him," though in a note it is said, "Suppose the attainder to be reversed upon error brought by the heir or executor of the party executed, the party would still have died by the hands of justice; but it would hardly be contended that, through this wrongful act, *in invitissimum*, his family were also to be deprived of the benefit of a contract entered into by him for their behoof." The questions thus suggested are hardly of practical importance.[3]

§ 225. A policy upon the life of a slave contained a clause that, "in case the said slave shall die by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice, this policy shall be void, null, and of no effect." The slave having been killed in an attempt made to arrest him as a runaway, it was held that the company was liable. The court say:[4] "The death of the slave Harry does not come within any of the exceptions contained in the policy. It is not pretended that his death was occasioned either from the want of proper medical aid, or by an invasion of the country." After giving definitions from lexicographers of the terms used, the court continue: "Let us now test this case by the definitions above stated. The slave Harry was owned by the plaintiff, and was, at the time his death occurred, a runaway. The individual who shot him was one of the regular patrol, who were then engaged in discharging their proper duty, in their proper district; and finding the slave there, they endeavored

[1] P. 453. [2] 5 M. & G. 639, 667.
[3] See on this subject, Prince of Wales Ass. Co. v. Palmer, 25 Beav. 605.
[4] Spruill v. North Carolina Mut. L. Ins. Co. 1 Jones' Law, 126.

to apprehend him, as it was their duty to do, and in the attempt made by him to escape he was killed. Here was no seditious rising against the government, nor was there any riot. The patrol was there for a lawful purpose; there was no tumult, nor any military or usurped power; nor did Harry die by any judicial judgment or proceedings. The plaintiff's case is not within any of the exceptions or conditions of his policy. We cannot adopt the ingenious suggestion of the defendants' counsel, that the defendants intended to insure against what is called a natural death, as distinguished from a violent death. It is sufficient to say, such is not the contract."

§ 226. **Change of Occupation.**—A clause is sometimes inserted making the policy void if the person insured engages in a more hazardous occupation than that in which he is engaged at the time of obtaining the insurance. Clauses of this kind are most common in accident insurance.[1] Such a provision does not mean a casual instance of employment in a new business, but a change of the usual business of the insured.[2] Sometimes certain occupations are specifically forbidden. Where a slave was insured as a laborer in a tobacco factory, and the policy declared he was not to be employed in a more hazardous occupation, it appeared that he was drowned by falling from a plank laid from a boat to the shore, having been sent by his master to be employed on a sugar plantation, which was conceded to be a more hazardous occupation. The court held[3] that, as the master was not prohibited from removing him from place to place, and as the slave had not entered upon his new occupation, the company was liable. "If the plaintiff had not had the intention of employing him upon a plantation, but had been taking the slave at the time of his death to work in a tobacco warehouse in Virginia, there could then be no doubt of the liability of the defendants." It was further held that evidence was not admissible to show that the company would not

[1] See Chapter on Accident Insurance. [2] Stone v. U. S. Casualty Co. 34 N. J. 371
[3] Summers v. U. S. Ins. Ann. & Trust Co. 13 La. Ann. 504.

have insured him at the rate paid, if it had known he would be subject to a voyage on a steamboat, as the evidence was intended, not to explain anything in the policy, but to establish a prohibition not contained in it.

Where the policy forbade the insured to engage in sea service without consent, but annexed to it was a permit to engage in such service on "the prior payment any year of an additional premium," and the insured paid the first additional premium, it was held[1] that the policy was forfeited by the continuance in sea service for more than a year without payment of another additional premium.

§ 227. **Age.**—The English policies contain a provision that evidence that the age is correctly stated in the declaration, shall be given at some time before payment of the claim. No such clause is, it is believed, introduced into any American policy, and it seems wholly unnecessary. The application always contains a warranty as to age, and if the age is incorrectly given, the policy is avoided. The practice of the English companies is not, however, to avail themselves of the clause in their policies to forfeit them, but only to reduce the sum to be paid. This is done in two different ways. The mistake is always found to be in understating the age. Some companies deduct from the sum assured the difference between the amount of premiums actually paid and those which should have been paid, with interest upon this difference to the time of death. Others hold the policy good for such sum as would have been insured at the real age by the premiums actually paid.[2] The latter course is obviously the most equitable. If, however, an under-statement as to age is apparently wilful, no reason is perceived why the policy should not be forfeited. It will not do to allow an insured person to deliberately understate his age, and thus pay to the company a less premium than he should, and at the

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[1] Ayer v. N. E. Mut. L. Ins. Co. MSS. to appear in 109 Mass.

[2] Bunyon, 81.

same time run the risk of no real loss if his fraud is detected.[1]

§ 228. **Suicide. Death by his Own Hands.**—There is an irreconcilable conflict of opinion upon the question of the effect upon the insurance contract of self-destruction by the person whose life is insured. The decisions in this country have seemed to be in direct opposition to one another. The courts of New York and Maine have appeared to take one view, those of Massachusetts another, with which the Circuit Judges of the United States for the Second and Third Circuits substantially agree, while the Court of Appeals in Kentucky stands equally divided, regarding the question with such diverse views that two of the judges describe the leading opinion in Massachusetts as "self-contradictory and inconclusive," and the court as being guilty of a "*petitio principii*" "to escape an absurdity," to which its argument leads, while the other two judges speak of it as an opinion in which "the reasoning was so clear, strong and palpable, and presented such a clear, practical point in such cases, that it unanimously carried the court of six judges, deservedly distinguished for their learning and ability." The Supreme Court of the United States have recently adopted the view supposed to be entertained in New York. This opinion, of course, will hereafter control the decisions of the national courts, and has been recently followed by the judges of the United States in Michigan and Iowa.

In England cases have arisen in which there was no provision in the policy upon the subject of suicide,[2] but in all the cases in this country, except one,[3] and in the leading ones in England, there has been an express provision in the policy. In most of the American cases the words of the proviso

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[1] Bunyon (p. 81) refers to a case where an insurance was effected, in 1827, on a warranty that the age did not exceed 61 years, but the policy was declared void on evidence that the age was at that time greater by from two to eleven years. *Ante*, § 121.

[2] Horn. v. Anglo-Aus. & Univ. Fam. L. Ins. Co. 7. Jur. N. S. 673; s. c. 30 L. J. Ch. 511; 9 W. R. 359; 4 L. T. N. S. 142.

[3] Fitch v. Am. Pop. L. Ins. Co. 2 N. Y. Supreme R. 247.

avoiding the policy are, "shall die by his own hand or hands."[1] In two it is "shall die by suicide."[2] In an unreported case,[3] it is "die by suicide or by his own hand, or in consequence of an attempt to commit suicide, or to take his own life." In one case,[4] it is "suicide, whether felonious or otherwise, sane or insane;" in another,[5] "die by his own hand, sane or insane," and in still another, die by suicide, felonious or otherwise, sane or insane.[6] In one,[7] of the two leading English cases it is "shall commit suicide," while in the other[8] it is "should die by his own hands." The meaning of these phrases is the same. Willard, J., remarks,[9] that of the forms of the proviso used by seventeen London Life Insurance Companies given in a note to Borradaile v. Hunter,[10] in eight the exception is of a death by suicide, in nine death by the insured's own hands, while in two others it is "death by suicide not *felo de se*," and in two more, "death by his own hands not *felo de se*." The Supreme Court of Massachusetts holds that there is no substantial difference of signification in the phrases "shall die by his own hand," "shall commit suicide," and "shall die by suicide,"[11] while the Supreme Court of the United States say,[12] "Nor do we see any difference for this purpose in the meaning of

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[1] Eastabrook v. Union Mut. L. Ins. Co. 54 Me. 224; Dean v. Am. Mut. L. Ins. Co. 4 Allen, 96; Breasted v. Farmers' Loan & Trust Co. 4 Hill, 73; s. c. on appeal, 4 Seld. 299; Hartman v. Keystone Ins. Co. 21 Penn. 466; Nimick v. Mut. Ben. L. Ins. Co. U. S. Circuit Court, West. Dist. of Penn. 3 Brewster, 502; s. c. Phila. Am. Law Reg. Feb. 1871; St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush. 268; Isett v. Am. L. Ins. Co. 1 Ins. Law Jour. 715; Van Zandt v. Mut. Ben. L. Ins. Co. 3 Ins. Law Jour. 208; McClure v. Mut. L. Ins. Co. *Ib.* 221; Moore v. Conn. Mut. L. Ins. Co. *Ib.* 444; Fowler v. Mut. L. Ins. Co. 4 Lans. 202.

[2] Cooper v. Mass. Mut. L. Ins. Co. 102 Mass. 227; Coverstone v. Conn. Mut. L. Ins. Co. 3 Ins. Law Jour. 113.

[3] Follmar v. Germania L. Ins. Co. MSS. Superior Ct. of Baltimore.

[4] Malory v. Traveler's Ins. Co, 2 Ins. Law Jour. 839.

[5] De Gorgoza v. Knickerbocker L. Ins. Co. 8 Alb. Law Jour. 10.

[6] Pierce v. Travelers' Ins. Co. 3 Ins. Law Jour. 422.

[7] Clift v. Schwabe, 2 C. & K. 134; s. c. 3 M. G. & S. 436.

[8] Borradaile v. Hunter, 5 M. & G. 639.

[9] Breasted v. Farmers' Loan & Trust Co. 4 Seld. 299; to same effect, Eastabrook v. Union Mut. L. Ins. Co. 54 Me. 224; Cooper v. Mass. Mut. L. Ins. Co. 102 Mass. 227.

[10] 5 M. & G. 648.

[11] Cooper v. Mass. Mut. L. Ins. Co. 102 Mass. 227.

[12] Life Ins. Co. v. Terry, 15 Wall. 580, 591; to same effect, Moore v. Conn. Mut. L. Ins. Co. U. S. C. C. E. D. of Mich. 3 Ins. Law Jour. 444.

the expressions, commit suicide, take his own life, or die by his own hands."

§ 229. **Different Views as to Meaning of the Phrases.**—The question upon which the Courts have differed is, as to the meaning of these phrases. They all agree that such a proviso does not make death by accident, though literally a death "by his own hands," work a forfeiture of the policy, and therefore, if a man takes poison, not knowing it to be such, or shoots himself with a pistol which he supposed not to be loaded, the policy is not forfeited, and the company remain liable.[1] But when it comes to the effect of the mental condition of the insured at the time he commits the act of self-destruction, the courts have, as already stated, arrived at diametrically opposite conclusions, and each side supports its views with strong, if not wholly convincing, arguments. "There is a conflict in the authorities which cannot be reconciled."[2] In this country, the courts of Massachusetts have decided the leading case upon one side of the question, and have substantially held[3] that where the insured kills himself, intending self-destruction, and having at the time sufficient capacity to understand the nature of the act which he is about to commit, and the consequences which would result from it, the company is not liable, though the insured was at the time under an insane delusion which rendered him morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his judgment, impelled him to commit the act.[4] The opinion of the Massachusetts court is sustained by the Circuit Judges of the United States for the Circuits,[5] and by two of the judges of the Court of Appeals of Kentucky.[6] On the other hand, the court of last resort in New York, in a case which was twice

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[1] Borradaile v. Hunter, 5 M. & G. 639; Breasted v. Farmers' Loan & Trust Co. 4 Seld. 299; Eastabrook v. Union Mut. L. Ins. Co. 54 Me. 224.

[2] Hunt, J., in Mut. L. Ins. Co. v. Terry, 15 Wall. 580, 588.

[3] Dean v. Am. Mut. L. Ins. Co. 4 Allen, 96.

[4] Gay v. Union Mut. L. Ins. Co. 9 Blatch. 142.

[5] Nimick v. Mut. Ben. L. Ins. Co. 3 Brewster, 502; s. c. Am. Law Register, Feb. 1871.

[6] St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush. 268.

before it, seemed to hold, by a majority vote, that self-destruction while insane, by a person who, when in that condition, threw himself into the river for the purpose of drowning himself, not being mentally capable of distinguishing between right and wrong, did not forfeit the policy.[1] This view is apparently sustained by the courts of Maine,[2] and by two of the judges in the Kentucky case already referred to, but the Court of Appeals in New York has, in a very recent case,[3] repudiated the doctrine usually supposed to be held in the case cited, and has adopted views similar to those entertained in Massachusetts. The court in Maine do not seem to intend to dissent from the doctrine of the Massachusetts case further than to hold that it has no application to the case before them, so that it may be said that the State courts are now substantially agreed in favor of the view entertained in Massachusetts, while the United States courts, controlled by the decision in Life Insurance Co. v. Terry,[4] take the contrary view.

The English courts hold, that if a man voluntarily commits self-destruction, knowing at the time that such will be the effect of the act he does, and intending to do it, but not being capable of judging between right and wrong, the policy is forfeited,[5] which is substantially the Massachusetts doctrine. This is the view which is not only supported by the strongest arguments but is now sustained by the decided preponderance of authority.

Incidental to these differences of opinion, and to the discussions they have involved, are the questions whether suicide by itself is any evidence of insanity, and what the presumption is, where a person commits suicide, whether it is that he is insane or not, and whether the fact of suicide overcomes the presumption of sanity.

In view of the diversity of opinion upon this subject, it

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[1] Breasted v. Farmers' Loan & Trust Co. 4 Hill, 73; s. c. on appeal, 4 Seld. 299.

[2] Eastabrook v. Union Mut. L. Ins. Co. 54 Me. 224.

[3] Van Zandt v. Mut. Ben. L. Ins. Co. 8 Ins. Law Jour. 208.

[4] 15 Wall. 580.

[5] Borradaile v. Hunter, 5 M. & G. 639.

seems proper to state, in the language of the courts, the views expressed by them.

§ 230. **The English Doctrine.**—The leading English case, as well as the earliest case reported, is that of Borradaile v. Hunter,[1] which arose in 1842, and in which the policy provided that if "the assured should die by his own hands or by the hands of justice, or in consequence of a duel," it should be void. The insured threw himself into the Thames and was drowned, and the jury found that he "voluntarily threw himself into the river, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but that at the time of committing the act he was not capable of judging between right and wrong." It was held by Justices Maule, Erskine and Coltman, that the policy was avoided, as the proviso included all acts of self-destruction, and was not limited to acts of felonious suicide. Tindal, C. J., dissented. In delivering their opinions, the judges expressed themselves as follows: Maule, J., "The words in question in their largest ordinary sense comprehend all cases of self-destruction, * * but, as it is admitted that in their largest sense they comprehend many cases not within their meaning, as used on the present occasion, it is to be considered whether the case of the testator falls within the object for which they are used in this policy. A policy by which the sum insured is payable on the death of the assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers therefore a temptation to self-destruction to this extent. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted. It ought, therefore, to be so construed as to include those cases of self-destruction in which, but for the condition, the act might have been committed, in order to accelerate the claim on the policy, and to exclude those in which

[1] 5 M. & G. 639; s. c. 5 Scott, N. R. 418; 7 Jur. 443; 12 L. J. C. P. 225.

the circumstances, supposing the policy to have been unconditional, would show that the act could not have been committed with a view to pecuniary interest. This principle of construction requires and accounts for the exclusion from the operation of the condition of those cases falling within the general sense of its words to which it is admitted not to apply—such as those of accident and delirium. To apply it to the present case: it appears by the finding of the jury, that the testator voluntarily threw himself into the water, intending to destroy his life, but that at the time he did so he was not capable of judging between right and wrong; and, as a man who drowns himself voluntarily may do it to found a claim on a policy, though he may not think it a wrong to do so, or though his mind may be so diseased that he does not know right from wrong—which, as I understand the finding of the jury, was the case with the testator—it seems to me that the object of the condition would not be effected, unless it comprehended such a case of self-destruction."

Erskine, J., before whom the case was originally tried, said: "I thought, that, as the words of the proviso, according to their ordinary acceptation, were large enough to include all intentional acts of self-destruction, whether criminal or not, if the deceased was laboring under no delusion as to the physical consequences of the act he was committing—if he knew that it was water into which he was about to throw himself, and that the consequence of his leaping from the bridge would be his death—and if he voluntarily threw himself from the bridge into the river, intending by so doing to drown himself—the question, whether he had been thereby guilty of a crime, as *felo de se*, or whether, if he had at that time destroyed the life of another instead of his own, he was in a state of mind to be morally and legally responsible for his acts, was irrelevant to the question before the jury—that the state of the mind of the assured was only material for the purpose of ascertaining whether the act of self-destruction was a voluntary and wilful act, for the purpose of destroying his life. * * * Looking simply at that branch of the proviso upon which

the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words, with reference to the nature of the contract, requires, is, that the act of self-destruction should be the voluntary and wilful act of a man, having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself. It has been argued, on the part of the plaintiff, that, as the very object of a life insurance is, to secure a provision for a surviving family against the fatal consequences of disease in the assured, if the act occasioning the death can be traced as the result of a diseased mind, the case comes within the main scope and object of the contract of insurance. This argument would have been unanswerable if the policy had been wholly silent on the subject, * * or if the proviso had been couched in terms pointed only to acts resulting from a criminal intention; but the very object of a proviso like the present is to take out of the operation of the general terms of the policy death resulting from causes which would otherwise fall within the general scope of the contract, though it *ex abundanti cautela*, also includes cases which the law itself would except, as those of criminal suicide and death by sentence of the law or duelling. * * It appears, indeed, to me that the fair inference to be drawn from the nature of the contract would be that the parties intended to include all wilful acts of self-destruction, whatever might be the general responsibility of the assured at the time, for although the probable results of disease producing death by physical means may be the fair subjects of calculation, the consequence of mental disorder, whether produced by bodily disease, by external circumstances or by corrupted principle, are equally beyond the reach of any reasonable estimate. * * It is well

known that the conduct of insane patients is in some degree under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds when fear of death or personal suffering might have no influence, and insurers might well desire not to put this restraint upon the mind and conduct of the assured, nor to release from all pecuniary interest in the life of the assured those on whose watchfulness its preservation might depend. When I find the terms 'shall commit suicide,' that have been popularly understood and judicially considered as importing a criminal act of self-destruction, exchanged for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context that the parties used them in a more limited sense."

Coltman, J., says: "The directors of this insurance company, as practical men, must be well aware that, if it is to be made a question before a jury between them and a plaintiff in the situation of this plaintiff, whether the party insured was of sane mind at the time of his decease, their chance of obtaining a verdict would be but small. The act of self-destruction would of itself be considered as a proof of insanity, and compassion for a distressed family struggling with a large and wealthy body, would in most cases prevent any calm appreciation of the evidence. I cannot, therefore, think that it was the intention of the office in framing this exception to subject themselves to liability in any case of voluntary self-destruction. It may be said that it was incumbent on the directors of this company to express themselves in clear and unequivocal terms. I agree that this is so; but it appears to me that the words, as they stand in the policy, are of themselves plain and explicit, and that, when words are plain, it then becomes the duty of the person who seeks to depart from the literal terms made use of, and to introduce a limitation which the words themselves do not import, to show some clear grounds on which he is entitled to introduce it.

It was further urged on behalf of the plaintiff, that, at any rate, to bring a case within the meaning of the exception, there must be an intention in the party to die by his own hands; and it was urged that an insane person could not be considered as having any intention; that by an intention was meant a controllable intention; that it was like the case of a man who should find himself suddenly on the brink of a precipice and irresistibly impelled to throw himself down it. But the fact in this case does not bear out the argument; there is no ground for saying that Mr. Borradaile acted under any such uncontrollable impulse; on the contrary, the jury have found that he did the act voluntarily, which implies that he had power to do the act or to abstain from it."

Tindal, C. J., in his dissenting opinion, says: "I therefore found the opinion at which I have arrived in this case upon the consideration that the insurers intended by the proviso to confine their exemption from liability to the case of felonious suicide only; that, if they intended the exception to extend both to the case of felonious self-destruction and self-destruction not felonious, they ought so to have expressed it clearly in the policy, and that, at all events, if they have left it doubtful on the face of the policy whether it is so confined or not, that doubt ought, in my opinion, to be determined against them; for it is incumbent on them to bring themselves within the exception, and, if their meaning remains in doubt, they have failed so to do."[1]

§ 231. In the subsequent case of Clift v. Schwabe,[2] the policy provided that it should be void if the person "should commit suicide, or die by duelling, or the hands of justice." He died in consequence of having voluntarily taken sulphuric acid, but under circumstances tending to show that he was, at the time, of unsound mind. The company having

[1] In the arguments of counsel and in a note to this case imperfect reports are given of several prior decisions. Taylor (Med. Jur. 755) gives in detail the facts in one of them, Kinnear v. Rock Ins. Co. he having been a witness. He also mentions (p. 761) a Scotch case.

[2] 3 M. G. & S. 437; s. c. 17 L. J. C. P. 2; 2 C. & K. 134.

pleaded that the insured did commit suicide, the judge, at the trial, instructed the jury, that to maintain their defence, the jury must be satisfied that the insured died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent; that the burden of proof as to his dying by his own voluntary act, was on the defendant, but that that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence. The jury having found a verdict against the company, the case was brought to the Exchequer Chamber on a bill of exceptions, where it was heard by a court composed of Pollock, Parke, Alderson, Patteson, Rolfe, Wightman and Coleridge, of whom Pollock and Wightman dissented from the decision of the court, which was, as briefly stated by Baron Parke, that if the deceased "voluntarily killed himself, it was immaterial whether he was sane or not." The attempt of counsel for the plaintiff was to distinguish the case from that of Borradaile v. Hunter, chiefly by claiming that the words "commit suicide" implied an act of criminality, which it had been held in the latter case, was not the meaning of the words "die by his own hands." In giving his opinion, Rolfe, B., after stating the instructions given by the judge at the trial, says: "We have, therefore, to say, whether that ruling was right; and this depends on the meaning of the words in the policy, 'shall commit suicide.' If they mean, 'shall destroy his own life under circumstances which will make him a *felo de se*,' then the ruling was right; if they mean merely 'shall intentionally kill himself,' then the ruling was wrong. The word 'suicide' is not, as it appears to me, a word of art, to which any legal meaning is to be fixed different from that which it is popularly understood to bear. The authorities referred to by the defendant in error, as showing that suicide means the felonious taking away of a man's own life, do not all bear out his proposition. Lord Hale, indeed, in the thirty-first chapter of his Pleas of the Crown, certainly speaks

of *felo de se* and suicide, as convertible terms, and defines both the one and the other as being, where a man, being of the age of discretion and *compos mentis*, voluntarily kills himself. But it appears to me plain from the whole context of the passage in question, that Lord Hale did not understand that he was giving a definition of the term suicide, except as it was often used to mean the same thing as *felo de se;* this seems manifest from the fact, that, what in the passage in question he calls suicide, he a few lines above designates as *homicidium sui ipsius.* * * The passage to which we were referred in Blackstone,[1] seems strongly to show that suicide does not, in the opinion of that learned judge, necessarily include the notion of moral responsibility. The learned commentator, after stating that the party who destroys himself is not *felo de se*, unless he was in his senses, adds that coroners' juries are apt to push this principle too far, and to hold that the very act of suicide is evidence of insanity. It is plain that the word suicide is there used as designating the mere act of self-destruction; otherwise the passage would be insensible. * * In my opinion, every act of self-destruction is, in common language, described by the word suicide, provided it be the intentional act of a party knowing the probable consequence of what he is about. This is, I think, the ordinary meaning of the word; and I see nothing in the context enabling me to give it any but its ordinary signification."

Patteson, J., says, "The sole question what is the true meaning of the words 'commit suicide,' in the policy in question? It is argued, first, that these words have a technical meaning, and import a felony. No authority is cited for this position; no case in which the finding of a jury that A. had 'committed suicide,' has been held equivalent to a finding that A. had 'murdered himself,' or that A. was 'a felon of himself.' I apprehend that the word '*murdravit*,' was as necessary in a case of *felo de se*, as in the case of the murder of another person; and * * I am at a loss to know what ground

[1] 4 Com. 189.

there is for saying that the words 'commit suicide' have any technical meaning. It is argued, secondly, that the words in their ordinary acceptation, import felony. Now, the word 'suicide,' literally translated, means only 'killing himself or herself;' the circumstances attending the act manifestly cannot affect the literal meaning of the word. * * The word 'commit' is said always to be used in a bad sense; be it so, but how does that prove that it communicates the quality of felonious to the word 'suicide?' No suicide is good or meritorious; it must always be spoken of in a bad sense, however pitiable, or, one may hope, excusable, the circumstances of it may be."

Alderson, B., says, "The words in question seem to me in this case to have their proper construction, when taken as including all cases of voluntary self-destruction. They do not apply to cases in which the will is not exercised at all; as, where death results from accident or delirium; but where the self-destruction is voluntary, although the will may be perverted. It seems to me, therefore, that the argument arising out of the peculiar use of the word 'suicide' in this contract, is fallacious; and that the word is often used in its most extended sense. * * The word 'suicide' has often, in its ordinary acceptation in the English language, that enlarged sense; and it is not, therefore, to be confined to cases of criminal intention alone. Then, reliance is placed upon the words in the company of which the word 'suicide' is found in the policy—'death by duelling, or by the hands of justice.' I doubt, however, whether that argument carries the case much further. Suppose a person insured were to die in a duel. I do not conceive it would be competent to his representatives to say that he was insane at the time. Cases may easily be suggested, in which a duel might be fatal, and yet not felonious; such as a duel in the course of war, or the like."

Parke, B., after referring to various definitions of suicide, says, "The case turns on the meaning of the vernacular language which we now use, and I must own that I feel no

doubt as to the import of the expression 'commit suicide.' In ordinary parlance, every one would so speak of one, who had purposely killed himself, whether from *tædium* of life, or transport of grief, or in a fit of temporary insanity. To die by his own hands, or to commit suicide, seems to me to be all one, and to apply to all cases of voluntary self-homicide."

The dissenting judges place their judgment exclusively on their opinion that the words "commit suicide" imply a felonious act. Pollock, B., examines the phrase historically, but he also introduces some valuable remarks upon the general equity of the case. He says, "A man anxious to provide for his family would, among other possible calamities of life that might terminate it, anticipate madness as one; and whether it prostrated his intellect altogether, or produced delirium, or destroyed only a part of his faculties would make no difference."[1]

§ 232. The only other English cases where the mental condition seems to have been directly in point are Dormay v. Borradaile[2] and Stormont v. Waterloo Life and Casualty Assurance Co.[3] The former was a case arising out of the same death as in Borradaile v. Hunter, the action being brought to recover damages on the ground that the act of self-destruction was a violation of a covenant in a marriage settlement to keep the policy on foot. The court held that it was not such a violation. The latter case is in a report of a trial at *nisi prius*, where the court instructed the jury that, to sustain the plea, they must find it a voluntary act, that the question

[1] It is stated in a note to Dormay v. Borradaile, that the propriety of the decision in this case is understood to have been doubted by other judges.

Bunyon remarks, p. 77, that while Pollock, C. B., and Wightman, J., dissented in Clift v. Schwabe, *in banc*, Cresswell, J., did the same in the court below, and it may be inferred from their remarks in Borradaile v. Hunter that Tindal, C. J., and Erskine, J., would have joined in the dissent if they had sat in the case. Besides them, Alexander, C. B., and Lord Tenterden, C. J., appear from their *nisi prius* decisions in the unreported cases cited in the notes to the last named case to have taken views similar to those held by the dissenting judges, while Lord St. Leonards, in his Law of Property (p. 73.), after referring to the decision, adds, "*sed quære?*"

[2] 5 M. G. & S. 380. [3] 1 F. & F. 22.

for them was, Did he *know* that he was throwing himself out the window?

§ 233. **The Rule in New York.**—The earliest American case is that of Breasted v. Farmers' Loan & Trust Co., first decided by the Supreme Court of New York upon demurrer in January, 1843,[1] and, again decided on appeal, after a trial and verdict against the company, in June, 1853.[2] The policy contained a condition that it should be void in case the assured should "die upon the seas, or by his own hand, or in consequence of a duel, or by the hands of justice." The defendants pleaded that the assured committed suicide by drowning himself in the Hudson River, and so died by his own hand. Replication that he was insane at the time; to which the defendants demurred. Nelson, C. J., in delivering the opinion says: "Self-destruction by a fellow-being bereft of reason can with no more propriety be ascribed to the act of his *own hand*, than to the deadly instrument that may have been used for the purpose. The drowning of Comfort was no more *his act*, in the sense of the law, than if he had been impelled by irresistible physical power; nor is there any greater reason for exempting the company from the risk assumed in the policy, than if his death had been occasioned by such means. Construing these words, therefore, according to their true, and, as I apprehend, universally received meaning among insurance offices, there can be no doubt that the termination of Comfort's life was not within the saving clause of the policy. Suicide involves the deliberate termination of one's existence while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law." The cause was subsequently tried by referees upon the general issue contained in the pleadings, and they reported in favor of the plaintiffs. They also reported specially, "That the assured, * * threw himself into Hudson River from the steamboat Erie, while insane, for the purpose of

[1] 4 Hill 73.

[2] 4 Seld. 299.

drowning himself, not being mentally capable at the time of distinguishing between right and wrong." Judgment was entered on the report, and the defendants appealed. Willard, J., in the prevailing opinion, which was concurred in by four other judges, says:[1] "It is material to determine, in the first place, what is meant by the term, death by his own hand, which is to avoid the policy. If the words are construed according to the letter, an accidental death occasioned by the instrumentality of the hand of the insured would fall within the exception." They rely in a measure upon the context, urging that the provisions in the same sentence as to death by the hands of justice, by duelling and in the known violation of law, all apply to a criminal act, and therefore infer that "death by his own hand," means a criminal act of self-destruction. But in the recent case of Van Zandt v. Mutual Benefit Life Insurance Co.,[2] the court say: "He does not place the decision on that ground, nor could it well stand there if the language of the policy in that case was the same as in the present, because in this policy the provisions in conjunction with which the words are used, relate as well to acts not criminal as to criminal acts; the same sentence embracing the visiting of prohibited territories, engaging in service upon the seas, or in military service, death from intemperance, &c. The maxim *noscitur a sociis* cannot, therefore, afford a reliable rule of interpretation."

They also urge that the words are to be taken most strongly against the insurer, it being admitted that the literal meaning was not the correct one, and that therefore some rule of interpretation must be applied. They then continue: "It was insisted that the expression must be taken to mean a death by his own act. It seems to me that this is a yielding of the whole question. An insane man, incapable of discerning between right and wrong, can form no intention. His acts are not the result of thought or reason, and no more the subject of punishment than those which are pro-

[1] 4 Seld. 299.

[2] 3 Ins. Law Jour. 208, referring to opinion of Grover, J., in Bradley v. Mut. Ben. L. Ins. Co. 45 N. Y. 434.

duced by accident. The acts of a madman which are the offspring of the disease, subject him to no criminal responsibility. If the insured, while engaged in his trade as a house joiner, had accidentally fallen through an opening in the chamber of a house he was constructing, and lost his life, the argument concedes that the insurer would have been liable. The reason is, that the mind did not concur with the act. How can this differ in principle from a death in a fit of insanity, when the party had no mind to concur in or oppose the act? It must occur to every prudent man, seeking to make provision for his family by an insurance on his life, that insanity is one of the diseases which may terminate his being. It is said the defendants did not insure the continuance of the intestate's reason. Nor did they in terms insure him against the small-pox or scarlet fever, but had he died of either disease no doubt the defendants would have been liable. They insured the continuance of his life. What difference can it make to them or to him, whether it is terminated by the ordinary course of a disease in his bed, or whether in a fit of delirium he ends it himself. In each case the death is occasioned by means within the meaning of the policy, if the exception contemplates, as I think it does, the destruction of life by the intestate while a rational agent, responsible for his acts. * * It is urged that because a person *non compos mentis* is liable *civiliter* for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception in the policy. That conclusion is not a legitimate deduction from the premises. A rational man is liable *civiliter* for an injury occasioned by an accident, unless it be an inevitable one, and yet no one pretends that the insurer is not liable for a death by accident, whether inevitable or not. Indeed, the liability for death by accident was conceded on the argument. A death by accident, and a death by the party's own hand when deprived of reason, stand on principle in the same category. In both cases the act is done without a controlling mind. If the insurer is liable in the one case, he should be in the other. If the insured was com-

pelled by duress to take his own life, it will hardly be contended that the insurer could avoid payment. In what consists the difference between the duress of man and the duress of Heaven? * * But it is urged that this is a civil action, and the contract of insurance a civil contract. Be it so. A person so destitute of reason as not to know the consequences of his acts can make no valid contract. Whether the incompetency be the result of disease or of intoxication, his contracts made while in that condition are void. If the party could do no act to bind himself, he certainly could do none to discharge the insurer. If he could not make a bond, he could not make a release. If he could not make a will, he could not revoke one. The liability of a lunatic for necessaries rests upon the ground that the law will raise a contract by implication on the part of the lunatic in favor of the party who has supplied them in good faith, and therefore does not affect the present question. The cases on this head are analogous to that of an infant. * * The law to prevent a failure of justice will imply a promise by a party incapable of making a contract; but it will never imply that a party incapable of distinguishing between right and wrong was guilty of a fraud. * * The referees in the present case have not found that the intestate acted *voluntarily*, or that he *knew* the consequence of his act. They merely find that while insane, for the purpose of drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If Borradaile v. Hunter[1] be an authority which we ought to follow, it differs so much from the case before us, that we are at liberty to decide it upon principle. * * The case of Clift v. Schwabe[2] is open to the same remark as Borradaile v. Hunter, *supra*. It turned upon the assumed fact that the act of suicide was *voluntary*, a fact not found by the referees in this case." From this opinion Gardner, J., dissented, and gave an opinion, concurred in by two of his associates, which turns chiefly upon

[1] 5 M. & G. 639.

[2] 2 C. & K. 134; s. c. 3 M. G. & S. 437; 17 L. J. C. P. 2.

a different construction placed upon the meaning of the finding. It is remarked in the case already referred to,[1] that "there was no finding that the act was voluntary or wilful. Such a finding would have established that the man was not deprived of his power of will, and that he could have restrained himself from the commission of the act, and would have negatived any insane impulse which he could not resist," and that in view of the well established rule, that on appeal all intendments are in support of the judgment, "the court could hardly have come to any other conclusion than it did," for the whole reading of the prevailing opinion shows that the finding was regarded as establishing "that the assured was so insane as not to be capable of forming an intention, and that he had not sufficient mind to concur in the act."

§ 234. **Rule in Maine.**—The case of Eastabrook v. Union Mutual Life Insurance Co.[2] was decided in 1866. Appleton, C. J., in delivering the opinion, says: "In no event can the person upon whose life the policy is effected be benefitted by his own death. Death, whether by disease, by accident, or the result of insanity, is in each case within the general object of the policy. * * The phrase 'die by his own hand' may include all cases of death by the person upon whose life the policy is effected, or it may receive limitations. If limitations, then the inquiry arises as to the extent of those limitations. The authorities concur in this, that the ex-

[1] Van Zandt v. Mut. Ben. L. Ins. Co. 3 Ins. Law Jour. 208 In a letter to the author, Hon. Lucius Robinson, late Comptroller of the State of New York, says: "I was intimately acquainted with Comfort, the deceased—I was present with him when he threw himself into the river—I had been with him and his friends before he went on board the boat—I have not the least doubt that he was totally insane and '*unconscious*' of what he did. This averment in the replication was made by Mr. Sherwood after consulting me as to the facts. The demurrer, of course, admitted the truth of the averment. The decision, therefore, was, that not knowing what he did, he was not responsible. The act was not *voluntary*. On the trial many witnesses were examined, myself among the rest. The referees found as stated in 8 N. Y. 299. Willard, in giving the opinion of the majority, assumed at the outset, page 303, that 'the question raised by the decision of the referees *is substantially the same* as that decided by the Supreme Court on the demurrer.' This was perhaps a pretty broad assumption, and Justice Gardner objected to it. Nevertheless it was the assumption upon which the decision was based."

[2] 54 Me. 224.

pression does not embrace all cases of death by one's own hand. * * When death is the result of insanity, it is equally the result of disease for which the insane is in no respect responsible. It is a well settled physiological principle, 'that disturbed intelligence has the same relation to the brain that disordered respiration has to the lungs and pleura.' Death, then, by an insane suicide, is as much death by disease as though it were death by fever or consumption. Death by accident or mistake, though by the party's own hand, is not within the condition. Death by disease is provided for by the policy. Insanity is a disease. Death, the result of insanity, is death by disease. The insane suicide no more dies by his own hand, than the suicide by mistake or accident. If the act be not the act of a responsible being, but is the result of any delusion or perversion, whether physical, intellectual, or moral, it is not the act of the man." * * After applying the maxim *noscitur a sociis* he continues: "The madman who in a fit of delirium commits suicide, as much dies by his own hand as does the individual who accidentally and unintentionally takes his own life. They each die by their own hands, but without moral responsibility or legal blame. One is no more within the conditions of the policy than the other. In each case it should receive the same construction. That a jury would be likely to regard suicide as proof of insanity does not affect the conclusion. If suicide is to be regarded as evidentiary of insanity, as it unquestionably is in most cases, then they generally arrive at correct results. If it is not properly to be so regarded, it may be an argument against a trial by jury, that the tribunal is one which allows itself to be governed by its prejudices rather than by the proofs, but it is none against the construction of the policy, that death by the hands of the insured, whether by accident, mistake, or in a fit of insanity, is to be governed by one and the same rule.

"Nor does the case of suicide by one insane fall within the danger, to guard against the occurrence of which this condition was inserted. * * The person whose life is insured

never receives money payable after his death. Suicide for the benefit of others is rare, exceptional and Quixotic. The love of life, the strongest sentiment of our nature, affords reasonable security against a danger so remotely probable. An insane man would be little likely to calculate the difference in value between a payment to be made immediately and one indefinitely deferred, and kill himself that some one else might receive the money at an earlier date in consequence of his committing suicide. * * Where the policy is on the life of a nominee, as in the one under consideration, the insurance can be no inducement to a criminal act, and may reasonably be construed to cover this as well as every other risk. There is, indeed, no reason why it should not do so; for the general tables of mortality, which form the basis of the calculations upon which the policy is founded, include this as well as every other cause of death; so that the particular risk is actually insured against."[1]

§ 235. **Rule in Massachusetts.**—A different view is, as already stated, maintained by the courts of Massachusetts. The case of Dean v. American Mutual Life Insurance Co.,[2] arose in 1862, and therefore after the New York case, and the leading English cases, but before the case in Maine, or those in the national courts.

The policy was conditioned to be void if the assured "shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any state, national, or municipal law." The insured came to his death by cutting his throat with a razor. Plaintiffs offered to prove that the death was caused during a state of insanity. Bigelow, C. J., in delivering the opinion, said, "The single question, therefore, which we have to determine is, whether, on the well settled principles applicable to the construction of contracts, we can so interpret the language of the policy as to add to the proviso words of qualification and limitation by which the natural import of the terms used by the

[1] Bunyon, 78.

[2] 4 Allen, 96.

parties to express their meaning, will be so modified and restricted that the case will be taken out of the proviso, and the policy be held valid and binding on the defendants. In other words, the inquiry is, whether the proviso can be so read, that the policy was to be void in case the assured should die by his own hand, he being sane when the suicide was committed. If these or equivalent words cannot be added to the proviso, or if it cannot be held that they are necessarily implied, then it must follow that the language used is to have its legitimate and ordinary signification, by which it is clear that the policy is void. * * But the language of the proviso is not necessarily limited by the mere force of its terms. The words used are of the most comprehensive character, and are sufficiently broad to include every act of self-destruction, however caused, without regard to the moral condition of the mind of the assured or his legal responsibility for his acts. Applying, then, the first and leading rule by which the construction of contracts is regulated and governed, we are to inquire what is a reasonable interpretation of this clause according to the intent of the parties. * * We are unable to see that there is anything unreasonable or inconsistent with the general purpose which the parties had in view in making and accepting the policy, in a clause which excepts from the risks assumed thereby, the death of the assured by his own hand, irrespective of the condition of his mind, as respecting his moral and legal responsibility at the time the act of self-destruction was consummated. Every insurer, in assuming a risk, imposes certain restrictions and conditions upon his liability. Nothing is more common than the insertion in policies of insurance of exceptions by which certain kinds or classes of hazards are taken out of the general risk which the insurer is willing to incur. Especially is this true in regard to losses which may arise or grow out of an act of the party insured. Such exceptions are founded on the reasonable assumption that the hazard is increased when the insurance extends to the consequences which may flow from the acts of the person

who is to receive a benefit himself or confer one on others by the happening of a loss within the terms of the policy. Where a party procures a policy on his life, payable to his wife and children, he contemplates that, in the event of his death, the sum insured will enure directly to their benefit. So far as a desire to provide in that contingency for the welfare and comfort of those dependent on him can operate on his mind, he is open to the temptation of a motive to accelerate a claim for a loss under the policy by an act of self-destruction. Against an increase of the risk arising from such a cause, it is one of the objects of the proviso in question to protect the insurers. Although the assured can derive no pecuniary advantage to himself by hastening his own death, he may have a motive to take his own life, and thus to create a claim under the policy, in order to confer a benefit on those who, in the event of his death, will be entitled to receive the sum insured on his life. Unless, then, we can say that such a motive cannot operate on a mind diseased, we cannot restrict the words of the proviso so as to except from the risk covered by the policy only cases of criminal suicide, where the assured was in a condition to be held legally and morally responsible for his acts. It certainly would be contrary to experience to affirm that an insane person cannot be influenced and governed in his actions by the ordinary motives which operate on the human mind. * * In the great majority of cases where reason has lost its legitimate control, and the power of exercising a sound and healthy volition is lost, the mind still retains sufficient power to supply motives and exert a direct and essential control over the actions. In such cases, the effect of the disease often is to give undue prominence to surrounding circumstances and events, and, by exaggerating their immediate effects or future consequences, to furnish incitement to acts of violence and folly. A person may be insane, entirely incapable of distinguishing between right and wrong, and without any just sense of moral responsibility, and yet retain sufficient powers of mind and reason to act with premedita-

tion, to understand and contemplate the nature and consequences of his own conduct, and to intend the result which his acts are calculated to produce. Insanity does not necessarily operate to deprive its subjects of their hopes and fears, or the other mental emotions which agitate and influence the minds of persons in the full possession of their faculties. On the contrary, its effect often is to stimulate certain powers to extraordinary and unhealthy action, and thus to overwhelm and destroy the due influence and control of the reason and judgment. Take an illustration. A man may labor under the insane delusion that he is coming to want, and that those who look to him for support will be subjected to the ills of extreme poverty. The natural effect of this species of insanity is to create great mental depression, under the influence of which the sufferer, with a view to avoid the evils and distress which he imagines to be impending over himself and those who are dependent on him for support, is impelled to destroy his own life. In such a case, suicide is the wilful and voluntary act of a person who understands its nature, and intends by it to accomplish the result of self-destruction. He may have acted from an insane impulse, which prevented him from appreciating the moral consequences of suicide; but nevertheless, he may have fully comprehended the physical effect of the means which he used to take his own life, and the consequences which might ensue to others from the suicidal act. It is against risks of this nature—the destruction of life by the voluntary and intentional act of the party assured—that the exception in the proviso is intended to protect the insurers. The moral responsibility for the act does not affect the nature of the hazard. The object is to guard against loss arising from a particular mode of death. The *causa causans*, the motive or influence which guided or controlled the will of the party in committing the act, are immaterial, as affecting the risk which the insurers intended to except from the policy. This view is entirely consistent with the nature of the contract. It is the ordinary case of an exception of a risk which would otherwise fall within the

general terms of the policy. These comprehended death by disease, either of the body or brain, from whatever cause arising. The proviso exempts the insurers from liability when the life is destroyed by the act of the party insured, although it may be distinctly traced as the result of a diseased mind. It may well be that insurers would be willing to assume the risk of the results flowing from all diseases of the body producing death by the operation of physical causes, and yet deem it expedient to avoid the hazards of mental disorder, in its effects on the will of the assured, whether it originated in bodily disease, or arose from external circumstances, or was produced by a want of moral and religious principle.

"It was urged very strongly by the learned counsel for the plaintiffs, that this view of the construction of the contract was open to the fatal objection, that it would necessarily lead to the absurd conclusion, that death occasioned by inevitable accident or overpowering force, or in a fit of delirium or frenzy, if the proximate and immediate cause was the hand of the person insured, would be excepted from the risks assumed by the defendants. But this objection is sufficiently answered by the obvious suggestion, that such an interpretation, although within the literal terms of the proviso, would be contrary to a reasonable intent, as derived from the subject-matter of the contract. * * Indeed, when it becomes necessary (as the case on the part of the plaintiffs requires) to desert the literal import of terms adopted by parties to express their meaning, as it cannot be reasonably supposed that they intended to enter into stipulations which would be unreasonable or absurd, all conclusions which tend to establish such a result are necessarily excluded. The question in such cases is not how far can the literal meaning of words be extended, but what is a reasonable limitation and qualification of them, having regard to the nature of the contract and the objects intended to be accomplished by it. Applying this principle to the present proviso, and assuming that the plaintiffs are right in their position, that the words used are not to be interpreted literally, it would

seem to be reasonable to hold that they were intended to except from the policy all cases of death caused by the voluntary act of the assured, when his deed of self-destruction was the result of intention, by a person knowing the nature and consequences of the act, although it may have been done under an insane delusion, which rendered the party morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his reason and judgment, impelled him to its commission. If the suicide was an act of volition, however excited or impelled, it may in a just sense be said that he died by his own hand. But beyond this it would not be reasonable to extend the meaning of the proviso. If the death was caused by accident, by superior and overwhelming force, in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will or intention of the party adapting means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted within the meaning of the proviso. A party cannot be said to die by his own hand, in the sense in which those words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake or accident, or of other circumstances over which the will can exercise no control.

"In seeking to ascertain the intention of parties, some weight is to be given to the practical results which would be likely to follow from the adoption of a particular construction of the words of a contract. It is reasonable to suppose that these were in contemplation of the insurers at the time the policy was issued. Certainly it is fair to infer that they intended to put some material limitations upon their liability by the insertion of this proviso. But if it is to be construed as including only cases of criminal self-destruction, it would rarely, if ever, effect this object. Those familiar with the business of insurance, and with the results of ac-

tions on policies of insurance in courts of law, know how difficult it is to establish a case of exemption from liability under an exception in a policy, where it depends on a question of fact to be decided by the verdict of a jury. If this is true in regard to ordinary claims under policies, it is obvious that the difficulty would be greatly enhanced in cases like the present, where it would be sufficient, in order to take a case out of the operation of the proviso, to prove that self-destruction was the result of insanity. It would not be hazardous to affirm that, in all cases where such an issue was to be determined by a jury between an insurance company and the representatives of the deceased, the act of suicide would be taken as proof of insanity. Such considerations were not likely to have escaped the attention of practical men in framing this general proviso; and, in a doubtful case of construction, they are not to be overlooked in giving an interpretation to the words used by them. * * It seems to us that the maxim *noscitur a sociis*, on which they rely, does not aid the construction for which they contend. The material part of the clause is, that the policy is to be void if the assured 'shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any state, national, or provincial law.' Now the first and most obvious consideration suggested by other parts of this clause is, that in enumerating the causes of death which shall not be deemed to be within the risks covered by the policy, one of them is in terms made to depend on the existence of a criminal intention. It is a 'known' violation of law which is to avoid the policy. This tends very strongly to show that where an act producing death may be either innocent or criminal, if it is intended to except only such as involves a guilty intent, it is carefully so expressed in the proviso. The inference is very strong that, if they designed to confine the exception in question to cases of criminal suicide, it would have been so provided in explicit terms. * * Take then another of the causes of death, death in a duel, enumerated in the proviso. It seems to us to be a *petitio*

principii to assume that death in consequence of a duel necessarily implies an act for which the party would be criminally responsible. Why is not this part of the proviso open to the same argument as that which is urged in regard to the clause relating to self-destruction? A duel may be fought by a party acting under duress, or impelled thereto by an insane delusion, which might blind his moral perceptions and render him legally irresponsible. If so, then the same answer to a defence set up against a claim under the policy would be open under this clause, as the one now urged in behalf of the plaintiffs; and the argument founded on the assumption that a forfeiture under this part of the proviso necessarily involves a criminal violation of law, falls to the ground. Therefore the inference that a guilty intention is communicated from this branch of the proviso to that relating to death by the act of the assured seems to us to be unfounded. The only remaining clause is that which provides for the case of death by the hands of justice. This undoubtedly implies that the person insured has been found guilty of a criminal act by a judicial tribunal according to the established forms of law. But it is not correct to say that it involves the existence of a criminal intent, because it might be shown that the conviction of the assured was erroneous, and that he was in fact innocent of the crime for which he suffered the penalty of death. So far, therefore, as any argument can be justly drawn from the connection in which the words as to self-destruction stand in relation to other parts of the proviso, it leads to the conclusion that it was not solely death occasioned by acts of the assured involving criminal intent or a wilful violation of law by a person morally and legally responsible, which was intended to be excepted from the risks assumed by the insurers; but that, with the exception of death in a known violation of law, the proviso embraces all cases where life is taken in consequence of the causes specified, without regard to the question, whether at the time the assured was amenable for his act, either *in foro conscientiæ* or in the tribunals of jus-

tice. * * It certainly never should be extended beyond the clear intent of the parties, as derived from other parts of the agreement, or the subject matter to which the contract relates. This position may be illustrated by reference to another part of the policy declared on. The proviso which precedes that on which the present question has arisen contains a stipulation that the policy shall be void if the assured, without the consent of the defendants in writing, shall during certain portions of the year visit the more southerly parts of the United States, or shall pass without the settled limits of the United States. If the assured in a fit of insanity should wander from his home and go within the prohibited territory, would the policy be void? If he was taken prisoner and went thither with his captors, would he lose his claims under the policy? * * * It is more safe to adhere to the strict letter of the contract, and to hold parties to the salutary rule which requires them to express in clear and unambiguous terms any exceptions which they desire to engraft on the general words of a contract. * * * The reason for the rule which exempts a person from liability on a contract into which he entered when insane is, that he is not deemed to have been capable of giving an intelligent assent to its terms. But this rule is not applicable, where a contract is made with a person in the full possession of his faculties, and he subsequently, in a fit of insanity, commits a breach of it or incurs a penalty under it. He is then bound by it. His mind and will have assented to it. No subsequent mental incapacity will absolve him from his responsibility on it, unless from its nature it implies the continued possession of reason and judgment and the action of an intelligent will. A party may be liable on an unexecuted contract, after he has lost the use of his mental faculties, as he may be held responsible *civiliter* for his torts. To say that insanity exonerates a party from a forfeiture under such a proviso in a policy, is to assume that this was the intention of the parties when the contract of insurance was entered into. But if such was not the intention, then it follows th-

the assured gave an intelligent assent to a contract, by which he stipulated that if he took his own life voluntarily, knowing the consequences of his act, he would thereby work a forfeiture of his claim under the policy, although he may have acted under the influence of insanity in committing the suicidal act. So that, after all, we are brought back to the inquiry, what was the intention of the parties to the contract, in order to ascertain the true construction of the proviso. * * * The facts agreed by the parties concerning the mode in which the plaintiff's intestate took his own life leave no room for doubt that self-destruction was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it. Such being the fact, it is wholly immaterial to the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him to a certain extent irresponsible for his actions."

§ 236. The case of Cooper v. Massachusetts Mutual Life Insurance Co.,[1] decided in 1867, holds that an offer to prove that the insured at the time of committing the act of self-destruction was insane, that he acted under the influence and impulse of insanity, and that the act of self-destruction was the direct result of insanity, was not enough to prevent the policy from being avoided, where the language was, shall "die by suicide." "In the present case, there was no offer to próve madness of delirium, or that the act of self-destruction was not the result of the will and intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act. The insanity, therefore, was not such as to take the case out of the proviso."

§ 237. The case of Nimick v. The Mutual Benefit Life Insurance Co., arose in the Circuit Court of the United States for the Western District of Pennsylvania, in December, 1870, and in his charge, McKennan, J., states his views of the law

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[1] 102 Mass. 227.

at length.[1] He says: "Was his death voluntary or accidental? If you find that it resulted from his own act, you will then consider the state of his mind as it affected the exercise of his will, and a comprehension of the physical nature and consequences of the act, aside from its moral character. * * The Judge then adopts the language of Erskine, J., in Borradaile v. Hunter:[2] 'It seems to me that the only qualification that a liberal interpretation of the words with reference to the nature of the contract requires, is, that the act of self-destruction should be the voluntary and wilful act of a man, having at the time sufficient powers of mind and reason to understand the physical nature and consequence of such act, and having, at the same time, a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose is not relevant to the inquiry, further than as it might illustrate the extent of his capacity to understand the physical character of the act itself.'" He then quotes at length from, and adopts the language of Dean v. American Mutual Life Insurance Co.,[3] and concludes: "We must not forget that we are dealing with a contract, reduced to writing and founded upon the assent of both the parties to it. It is our imperative duty, then, to expound and enforce it, as the parties themselves have made and declared it to be, not as we might think it ought to have been made. * * If, however, you believe, from the evidence, that he committed self-destruction, that he intended to destroy his life, and comprehended the physical nature and consequences of his act, the plaintiffs are not entitled to recover, and your verdict should be for the defendant." The jury found a verdict for plaintiff, which, on motion, was set aside, and new trial ordered, on which the jury disagreed.[4]

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[1] 3 Brewster, 502; s. c. Phila. Am. Law Reg. Feb. 1871.

[2] 5 M. & G. 639.

[3] 4 Allen, 96.

[4] Judge McKennan took the same view of the law in the subsequent unreported case of Billmeyer v. Guardian L. Ins. Co. It is, of course, controlled by the subsequent decision of the Supreme Court, in Ins. Co. v. Terry, 15 Wall. 169. *Post*, § 241.

§ 238. The case from Kentucky already referred to[1] arose in 1869. The court was equally divided upon the question of suicide, but, as all agreed that there had been an error in the admission of evidence, a new trial was ordered. Robertson, J., in an opinion concurred in by Peters, J., says: "All these terms alike, being *ejusdem generis*, imply a death as the natural consequence of some *voluntary* act of the assured which he had the moral power to avoid, and against which, therefore, the underwriters would not insure, and could not, consistently with public policy, have insured. The inevitable act of an insane man, who in that respect is morally dead, is not, in the sense of the law or of the recited conditions, his voluntary act. An insane act is no more voluntary than any act constrained by extraneous force would be the voluntary and responsible act of the victim of accident or resistless power over his will. The object of the policy was to insure against involuntary death without the fault of the assured. Graves was insured as a free moral agent, who, as such, might voluntarily so act as to increase the contemplated risk. It was prudent and just, therefore, to provide in the policy against any extraordinary perils to life resulting from the voluntary conduct of the assured, who, by necessary implication, undertook to abstain from any act jeopardizing his life beyond the ordinary accidents to which it was liable without his fault. For this precautionary condition there was a reasonable and consistent motive. But there was no such motive for avoiding the policy for *inevitable* suicide, which, whether accidental or otherwise against the free will of a rational mind, is essentially in the category of natural death from ordinary causes, as indisputably insured against. Mental insanity is disease; and the policy insures against death by disease of any sort which ordinary prudence could not avoid. Death by insanity is death by disease, and is so considered in medical jurisprudence. Why except from the insurance death by insanity? Did not the parties contemplate

[1] St. Louis Mut. L. Ins. Co. v. Graves, 6 Bush, 268.

death by any disease not avoidable by prudent and proper conduct? The underwriters took all such risk and no other; and, to prevent fraud or imposture, excepted death by *opium* or by *delirium tremens* and other causes which the assured could avoid and ought to avoid, and therefore impliedly undertook to avoid. Death 'by his own hand' is in the same class of causes for avoidance, and means the same character of avoidable death. The mind is the man, and the conditions of avoidance all alike contemplate a rational mind and presiding will. Death by opium, therefore, means not the accidental or involuntary, but the rational and voluntary use of opium; death by *delirium tremens* imports death by voluntary and habitual drunkenness; and death by duelling is a voluntary act; all of which deaths might and ought to have been avoided. So, for the same reason, death 'by his own hand' means suicide, not accidental or coerced, but premeditated by a sound mind and perpetrated by a free will; and a voluntary act of the will necessarily implies liberty and self-control, and consequently the act of an insane mind or subjugated will is not voluntary. It is not the act of the man, but of some power above him, and which his will cannot elude or control. The condition as to death 'by his own hand' reasonably imports, therefore, that if the insured should commit suicide voluntarily when he had the moral power to forbear, just as he might commit it by the habitual use of opium or intoxicating liquors, the policy should be thereby avoided. The death, in each case alike, must be the voluntary act of a sane mind and a responsible will. * * No mind, itself rational, can contemplate any act as voluntary unless it be the offspring of a free volition, unconstrained by inevitable duress, physical or moral. * * Every self-destroyer literally dies 'by his own hand;' but technical suicide implies a sane and controlling mind. All this the parties to the policy must be presumed to have understood and consequently to have contemplated by the words, 'if he died by his own hand,' the death of a sane man by his own voluntary act, and not by accident or the merely mechanical hand of a

maniac. * * If the death was not an act of free volition, the unconstrained will of a sane and self-poised mind, the appellant is responsible; otherwise not. * * In moral dethronement by insane passion there may be no delusion, but the will is overwhelmed by delirious passion, which it can neither stifle nor successfully resist. * * If a paroxysm of moral insanity caused the death of the assured, the suicidal act was involuntary, and at the instant unavoidable, even if he then knew its illegality and all its consequences."

Williams, C. J., in an opinion concurred in by Hardin, J., says: "As the general covenants of the policy assured against all deaths by disease, whether of body or mind, what did the parties mean by inserting the proviso that the company was not to be responsible 'if he shall die by his own hands?' These are important and pregnant words, full of meaning. In natural and common parlance there would be but little difficulty in this determination. * * The party did not intend to insure against self-destruction; yet, says the refined metaphysician, this means a voluntary self-destruction, and if the party was morally or mentally insane he did not destroy himself, and that the act of self-destruction is evidence in itself of such moral insanity. So the act of taking his own life disproves the self-destruction. Was there ever a more self-destroying argument or theory? And if this theory be true, that the act of suicide evidences insanity, either moral or mental, does this not itself establish the fact that it was against such death that the company refused to insure, and so provided for its exemption from the operation of the general covenants of the policy? If moral insanity, when the mind is left unimpaired, is to be substituted for disease, to what purpose were the words used? What kind of self-destruction did they provide against? * * Here the insurance company does not insure against self-destruction. This, says the theorist, does not embrace an act of moral or mental insanity, and that the act of self-destruction evidences, in itself, such moral insanity; the inevitable logical result therefore is, that as self-destruction testifies to moral insanity, which is not em-

braced in the proviso, so self-destruction is not embraced in the words 'if he die by his own hands.' If this be so, what do they mean? For there they stand as part of the covenant, and as a qualification to the previously used general terms of responsibility by the company. This in effect, and to all legal and practical purpose, nullifies and abolishes the proviso, and renders it a mere *brutum fulmen*, a senseless, imbecile provision. * * The close proximity of the words 'shall die by his own hand' to words signifying criminal intent, no more indicates that such intent enters into their meaning than does their close proximity to other words importing no such intent, but an innocent one, show that they should be construed to mean irresponsible, innocent action; and as these words stand in close connection with both classes of words how shall courts determine that they are to be construed by the one rather than the other?"

§ 239. In Gay v. Union Mutual Life Insurance Co., Woodruff[1] and Shipman, J.,[2] held that if the insured "was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable; and that, if the act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. And, to give you the alternative, if, on the other hand, he was not thus conscious, or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse, which neither understanding nor will could resist, then the defendants are liable."

§ 240. **Present Rule in New York.**—In a very recent case in New York,[3] the doctrine heretofore supposed to be established in that State is so greatly modified, as to agree substantially with the Massachusetts doctrine. The Court of

[1] 9 Blatch. 142.

[2] 2 Bigelow Life & Acc. Cases, 4. This case must be considered as overruled by the decision of the Supreme Court in Life Ins. Co. v. Terry, 15 Wall. 180; *post*, § 241.

[3] Van Zandt v. Mut. Ben. L. Ins. Co. 3 Ins. Law Jour. 208.

Appeals say that the court below, "among other things, submitted to the jury the question, whether the assured was at the time of his self-destruction incapable of determining whether the act was right or wrong, and not conscious of its moral obliquity. The case distinctly presents the question, whether that degree of mental disorder is sufficient to prevent the act of self-destruction from operating as a breach of the condition and avoiding the policy, notwithstanding that the assured retained at the time sufficient power of mind and reason to understand the physical nature and consequences of the act by which he destroyed his own life, and it was voluntarily and wilfully committed by him with the purpose and intention of causing his own death. This question is raised by exceptions to the charge, but especially by exceptions to refusals of requests to charge, framed with reference to the precise point. * * * The defendant's counsel, among other things, requested the court to charge, that if the act of self-destruction was the voluntary and wilful act of the deceased, he having at the time sufficient power of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by the act, it avoided the policy. This request was refused and an exception was duly taken. The rule is well settled in England in conformity with the request. It is there held that a voluntary and intentional self-destruction by the insured is within the proviso, notwithstanding that he was at the time incapable of appreciating the moral quality of the act, and that his capacity to appreciate its moral nature is not a material question, except as bearing upon the inquiry whether he had sufficient mental capacity to understand its physical consequences, and was in possession of his power of will. The leading cases upon this subject are Borradaile v. Hunter,[1] and Clift v. Schwabe.[2] According to those decisions, to take a case out of the proviso, the party must have been insane to

[1] 5 M. & G. 639.

[2] 3 M. G. & S. 437.

such a degree as to render him unconscious that the act he did would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist. His mind must have been so far gone that it was not moving to the act. It is not sufficient that his moral sense was so impaired as to deprive the act of its criminal character."

After commenting upon Breasted v. Farmers' Loan & Trust Co. in the terms already quoted,[1] the court continued: "A finding [in that case] in the language of the request in the present case, that the deceased had sufficient power of mind and reason to understand the physical nature and consequences of the act, and that he committed it voluntarily and wilfully and in pursuance of a purpose and intention thereby to cause his own death, would have established that insanity did not exist to such a degree as to prevent him from forming an intention, or being conscious of the act he was doing. It would have established that his mind did concur with the act, and that this being voluntary was not the result of any insane impulse or want of power of self-control. Whether so much power of reasoning and of self-control could be left in a mind so impaired as to be incapable of appreciating the moral obliquity of the crime of suicide is rather a scientific than a legal question. Judge Willard, in the Breasted case, expresses the opinion that a man so insane as to be incapable of discerning between right and wrong can form no intention. This, it must be observed in passing, is a much broader proposition than that the failure to appreciate the wrong of a particular act evinces a total deprivation of reason. The loss of moral sense, even to that extent, in one who had previously possessed it, would undoubtedly be a fact bearing strongly upon the question whether he retained his other faculties. But in the practical administration of justice in cases of this description, it seems to us a dangerous doctrine to hold that the attention of the jury should be directed principally to the

[1] *Ante*, § 233.

degree of appreciation which the deceased had of the moral nature of his act, and that this question, most speculative and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether from disease his mind had ceased to control his actions. Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind has become so morbidly diseased on the subject of suicide that he cannot appreciate its moral wrong, and in this condition of mind he takes his own life voluntarily and intentionally, perhaps with the very object of securing to his family the benefits of an insurance upon his life, it is difficult to say that this is not a death by his own hand, within the meaning of the policy. * * * When nothing is said in the policy with respect to insanity, the words "die by his own hand" in their literal sense comprehend all cases of self-destruction. The exceptions which have been engrafted upon these words by judicial decisions must rest upon the ground that the excepted cases could not have been within the meaning of the parties to the policy. The intent on the part of the insurer in inserting the condition is evident. The policy creates in the assured a pecuniary interest in his own death. To a man laboring under the pressure of poverty and the urgent wants of a dependent family or of inability to discharge sacred pecuniary obligations or other similar causes, the policy offers a temptation to self-destruction. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted.[1] The condition ought, therefore, to be so construed as to exclude only those cases in which these motives could not have operated, such as accident or delirium.[2] So far as considerations of public policy have any place in determining such a question, they are undoubtedly in favor of confining the exceptions to the con-

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[1] Per Maule, J., 5 M. & G. 653.

[2] *Ibid.*

dition to cases in which the self-destruction is clearly shown to have been accidental or involuntary. I do not find that any of the cases have gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, when it was voluntary and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse, or want of power of will or self-control, is sufficient to take a case out of the proviso. The contrary has been held in several cases." The court therefore held in accordance with the case of Borradaile v. Hunter.[1]

In the unreported case of Mallory v. Travelers' Insurance Co.,[2] the question of insanity was incidentally presented under circumstances which left it doubtful whether the death occurred from suicide or from accident. The court there instructed the jury that if the condition of the deceased at the time of the death was such that he could not distinguish between right and wrong, if it was such that he did not know that he was doing an act which would produce death, then his suicide was involuntary, and the court at General Term say: "This was quite as favorable to the defendant as the rule of law upon this subject in this State would allow."

§ 241. **The Rule in the National Courts.**—The only recent cases which seem at all to run counter to the general current of modern decisions upon suicide are those of Mutual Life Insurance Co. v. Terry,[3] and cases in United States Courts governed by it.[4] In the first named case the company at the trial requested a charge, that if the insured had sufficient mental capacity to know that he was about to take poison,

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[1] 5 M. & G. 639. The cases of Fowler v. Mut. L. Ins. Co. 4 Lans. 202, and McClure v. Mut. Ben. L. Ins. Co. 3 Ins. Law Jour. 225, were decided solely upon the question whether there was sufficient evidence of insanity to go to the jury, and are therefore referred to in the chapter on Evidence.

[2] To be found on appeal 47 N. Y. 52, but the Court of Appeals do not pass upon this question. A case of the same title, but with a different plaintiff, was decided in 1872 by the Commission of Appeals, 2 Ins. Law Jour. 839. The exception in the latter case was "suicide, whether felonious or otherwise, sane or insane."

[3] 15 Wall. 580; s. c. 2 Ins. Law Jour. 540, and below, 1 Dillon, 403.

[4] See Moore v. Conn. Mut. L. Ins. Co. 3 Ins. Law Jour. 444; Overstone v. Conn. Mut. L. Ins. Co. *Ibid.* 113.

and that his death would be the result, he was responsible, and that the fact that his sense of moral responsibility was impaired by insanity did not affect the case, but the court held that, though he knew the facts stated, yet "if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do," or if he was "impelled to the act by an insane impulse which the reason that was left did not enable him to resist," the company was liable. On appeal the court say: "It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania transitoria*, that is, the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress, or excitement does not bring the case within the rule if the insured possesses his ordinary reasoning faculties."

After examining all the cases, the court say: "The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon the responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will then made by him would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offence, upon all the authorities, he would have been entitled to a charge that, upon proof of the facts assumed, the jury must acquit him. We think a similar principle must control the present case, though the standard may be different. We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reason-

ing faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act [1] he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." They further held that even where, as in the case before them, the insured was not a party to the contract, the same rule applies; "We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties."

Of this case the New York Court of Appeals say,[2] "It will be found upon an examination of that case, that the question of the capacity of the deceased to appreciate the moral character of the act was not involved, and that all that is said upon that subject in the opinion is *obiter*. The judge, at the trial,[3] expressly instructed the jury that it was not every degree of insanity which would so far excuse the party taking his own life as to make the party insuring liable, but that the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act he was committing, or he must have been impelled by some insane impulse which the reason that was left him did not enable him to resist. Not a word was said to the jury in respect to his consciousness of the moral quality of the act. The requests to charge, which were refused, re-

[1] It is held in Moore v. Conn. Mut. L. Ins. Co. in the U. S. Circuit for the Eastern District of Michigan, 8 Ins. Law Jour. 444, that these words, the "general nature, consequences, and effect of the act" in this opinion do not refer to the act "by which the deceased took his life. They are broader than that; they refer to the entire act, not only the act by which he took his life, but the result of it. That is, they cover the 'suicide,' the accomplished fact; and that is what is referred to as the 'general nature, consequences and effect of the act,' that is, the general nature of the suicide, of the murder committed upon one's self, the enormity and effect of it; otherwise it would be inconsistent with what precedes; because, if it was his voluntary act, he knowing and intending that his death would be the result, then it would be a simple absurdity to put the question to you whether, under those circumstances, if he did not understand the general nature and consequences of the act, that the company would be liable. That would be, I say, absurd. Those words then, have a broader meaning, and cover the entire accomplished fact, the act of suicide."

[2] Van Zandt v. Mut. Ben. L. Ins. Co. 8 Ins. Law Jour. 205; *ante*, § 240

[3] 1 Dillon, 403.

quired the submission to the jury only of the question of the capacity of the deceased to understand the nature and consequences of the act, and did not require them to find that it was voluntary, and therefore did not exclude the hypothesis of an insane impulse which he could not resist. The opinion delivered in the Supreme Court, in the Terry case, contains some general language, which goes far beyond the charge in the Circuit Court, and was not necessary to sustain the judgments. I refer to that part of the opinion which is relied upon in the points of the respondent in this case, and in which the learned judge says, that 'if the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist,' the insurer is liable. The precise effect of this passage is not very clear to us, as it includes several conditions which can hardly co-exist. It can be conceived that the act might have been voluntary and the self-destruction intentional, though the assured failed to appreciate its moral character, but it is difficult to conceive how the act could have been voluntary and intentional when the faculties of the deceased were so impaired that he was not able to understand 'the general nature, consequences and effect of the act he was about to commit,' or when he was impelled thereto by an insane impulse which he had not the power to resist."

In Moore v. Connecticut Mutual Life Insurance Co.,[1] it is, however, claimed that the Court of Appeals is in error, and that, therefore, the remarks of the Supreme Court were not *obiter*. The court say: "The learned counsel in this case have overlooked one peculiar feature of the case of the Insurance Company v. Terry, and that is the refusal of the court below to charge as requested. This precise question

[1] 3 Ins. Law Jour. 444, U. S. C. C. East. Dist. of Mich.

was presented in the request to charge, which the court refused to give, and the charge which was given by the court below must be read in connection with and in the light of the requests which had been made and were refused, and that request presenting this exact question of the moral character of the act and of moral insanity, in my opinion, was clearly and fully before the Supreme Court. For the purpose of sustaining that position, I will read the request which was refused, and in response to which the charge was given which was given. The second request on the part of the defendant was: 'That if the jury believe, from the evidence, that the said self-destruction of said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act he was about to commit, and the consequences which would result from it, then in that case it was wholly immaterial that he was impelled thereto by insane impulse which impaired his sense of moral responsibility and rendered him to a certain extent irresponsible for his action'—thus presenting the exact question upon which the Supreme Court passed, and which is embodied in the plaintiff's third request. It is true the court below did not include in express terms in the charge given this question of moral responsibility or of moral insanity, but the terms used in the charge which was given are broad enough to include that, and in view of the fact that the court had been requested to charge otherwise, and then using expressions which are broad enough to include that, it is fair to presume that it was so included, and that the jury so understood. The language of the charge as given was as follows: 'If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties in the act he was about to do, the company is liable.' This charge must be read in the light of the request which had been refused, and which expressly included the question of moral insanity."

In the case last cited, Longyear, J., after referring to the

fact that the decision in Mutual Life Insurance Co. v. Terry was in accordance with his own previously expressed views, charged the jury, "If you shall decide that he was insane, you must go then a step farther, and inquire whether his insanity was of that degree and kind that you are satisfied that he was driven by an irresistible impulse to commit the act, or that he was incapable of exercising his reasoning powers as to the moral character, general effect and consequences of taking his own life. If, after finding that he was insane, you shall come to the conclusion that he was thus insane, the plaintiff is entitled to recover at your hands; otherwise not."

§ 242. In an unreported case in the Superior Court of Baltimore,[1] the provision was against death "by suicide, or by his own hand, or in consequence of an attempt to commit suicide or to take his own life," the court held that insanity was a disease, and that there was no reason why the company should be exempted from liability in case of death by that disease any more than any other, and that the exception in the policy applied only to cases in which there was an intentional killing of himself by the assured—that is a deliberate killing of himself by a person capable of knowing the results of his action, and not a killing of himself by a party not in his sound mind.

§ 243. **Suicide and Death by his Own Hands, Sane or Insane.**—In some recent cases the language of the exception has been modified, obviously with the intention on the part of the insurers to avoid the difficulties connected with the question of insanity. In Mallory v. Travelers' Insurance Co.,[2] the clause read "suicide, whether felonious or otherwise, sane or insane." The court say, "The language of the exception in the present case does not appear to have been very happily chosen to express in concise words any definite idea. But it may be presumed that it was intended to cover a suicide committed with deliberate design by a person in

[1] Follmar v. Germania L. Ins. Co. MSS.

[2] 2 Ins. Law Jour. 839, N. Y. Commission of Appeals. Such a clause is valid, Van Zandt v. Mut. Ben. L. Ins. Co. 3 Ins. Law Jour. 208, 218.

sound mind, and further, that the company should not be responsible if the assured, in an insane state, by his own act destroyed his life by any of the means usually resorted to for the achievement of that purpose." But the jury having found that the death was accidental, it was not necessary to pass upon this question.

In De Gorgoza v. Knickerbocker Life Insurance Co.,[1] the clause was, "in case he shall die by his own hand, sane or insane," and it was held that the words "sane or insane" had no further effect than to render the policy void if the insured intended self-destruction while in a state of insanity. The plaintiff's counsel claimed that if the insured intended self-destruction, whether he was sane or insane, the plaintiff could not recover. If the act was wholly involuntary, whether the result of pure accident or of a blind impulse over which he had no control, he being incapable of exercising his will, the company were liable; but if the act was voluntary or intentional, then they were not liable; that the introduction of these words did not alter the question to be determined, viz., whether the deceased did or did not die by his own act or hand in the sense of the law, nor the settled rule of construction that those words require an intentional voluntary act of self-destruction. A sane man may die by his own act without meaning it, and an insane man may yet have wit and will enough left to design and contrive his own death, and the sole object of the clause being to restrain the assured from the temptation to wilful self-destruction, in either case, if the death was involuntary and not intended, the act could not be said to be the act of the deceased, and the policy was not discharged. In this view, the words "sane or insane" made no difference. They were but words of description, like "sick or well," "drunk or sober," "old or young," covering every possible mental condition, but making no difference in the question. And the court seem to have adopted this view. At the trial the judge in his charge to the jury said, "It will be for you to in-

[1] 8 Albany Law Jour. 10. N. Y. Supreme Ct. The original papers have been examined. The case is now in the Court of Appeals.

quire next, whether you are reasonably satisfied on this evidence that the mental condition of the assured at the time the pistol exploded was such that the act on his part was not a voluntary act, because, if the act was not an act of his own will, the exception in the policy does not apply to this case, and the company would be liable. If, on the other hand, whether you believe that he was sane or insane at the time, if you see any evidence in the case warranting your coming to the conclusion that he intended self-destruction, either for the purpose of relieving himself from the condition he was in, or any other purpose, then the plaintiff would not be entitled to recover. The primary and important question to determine is, whether he was actuated by a will—whether it was a voluntary act, or whether it was from an impulse over which he had no control. If it was the latter, then he was not a responsible agent, and it is not a case which exonerates the company from liability. But if you are satisfied this act was voluntary, intentional self-destruction, such an act would exonerate the company, and the plaintiff would not be entitled to recover. If it was the involuntary act of a person in a mental condition which satisfies you he was incapable of exercising his will, then the company are liable. On appeal, the General Term say, "The introduction of the words 'sane or insane' in this policy can have no further effect under the above decisions than to hold the policy void if the insured intended self-destruction while in a state of insanity."

In a recent case in Wisconsin the language was,[1] "shall die by suicide, felonious or otherwise, sane or insane." The court say, "The intention here manifested is so plain as to seem incapable of further explanation, and unless there is something in the policy of the law which forbids such stipulation, we have nothing to do but to give effect to it. For however the word 'suicide' * * might, if standing alone, be construed to imply a felonious self-destruction, or self-destruction by a sane man, or one capable of understanding the nature and consequences of his own act, and of judging

[1] Pierce v. Traveler's Ins. Co. 8 Ins. Law Jour. 422.

between right and wrong, it is obvious that it cannot be so received or applied here. Such construction is forbidden by the express words of the condition, which declare that it shall make no difference whether the suicide was felonious or otherwise, or whether the party committing it was sane or insane at the time. The parties here, therefore, by the very language of the condition, defined the sense in which they used the word, and by that definition the courts must be bound, unless there be something in the condition contrary to public policy or sound morals, which is not pretended." The court then holds that the construction must be the same as that which was given by the majority of the court to the exception in Borradaile v. Hunter, which they interpret as holding that "where the assured killed himself intentionally, though not feloniously, as by any voluntary act of his the natural, ordinary and direct tendency or effect of which would be to produce his death, and which act he had at the time sufficient mental capacity to comprehend and to foresee and estimate the physical consequences of, such self-destruction was 'death by his own hands' or suicide, within the meaning of the exception contained in the policy." * * * They then continue, "It has been suggested that the construction here given would necessarily lead to the denial of any claim under the policy if the assured had come to his death in the manner or by any of the means supposed by way of illustration in Borradaile v. Hunter, and there considered as not falling within the intent of the exception, as for example, if his death had resulted from an act committed under the influence of delirium, as if he had in a paroxysm of fever precipitated himself from a window, or, having been bled, removed the bandages, or had taken poison by mistake, and death in either case had ensued. It is obvious that this kind of wholly unintentional or accidental self-destruction, which never received and never deserved the name of 'suicide,' is not within the spirit or intent of the proviso. The use of the word 'suicide' in this condition indicates with greater clearness and certainty than any words found there, that such

was not the intention of the insurance company. Deaths of the kind last above spoken of, or produced as there stated, are more properly denominated deaths by accident than deaths by suicide, and the circumstances attending them would clearly not be such as the parties contemplated at the time of entering into the contract, and therefore should not, as it clearly seems to me, be held within the intent of this condition any more than within that in Borradaile v. Hunter. Deaths so caused are held to be deaths by accident within the meaning and purpose of policies of insurance against accident, as where a man negligently 'draws a loaded gun towards him by the muzzle, or the servant fills the lighted lamp with kerosene, and the gun is discharged and the lamp explodes,' which are the cases put by way of illustrating what constitutes an accident in an action upon such a policy, in Schneider v. Provident Life Insurance Co.[1] The condition here relieves the company from liability only where the self-destruction was intentional, or committed by a party who was conscious of the nature of the act he was committing or about to commit, and conscious of the direct and immediate consequences, and this notwithstanding the act may have been unaccompanied by any criminal or felonious intent or purpose. It does not apply or relieve the company where the death of the assured was accidental or may be properly said to have been caused by accident, though brought about, it may have been, by his own hands or by some dangerous or destructive instrument held in them."

§ 244. **Opinions of the Author.**—The views taken by the State courts upon the question of suicide seem most in accordance with the intention of the parties to the contract. It will be observed that in all the cases referred to there was a provision in the policy as to self-destruction, and there was, moreover, a finding by the jury, of a greater or less degree of mental disturbance. The evidence from which insanity was inferred, was in some of the cases very slight, amounting really to little more than the fact of suicide. Indeed, between the

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[1] 24 Wisc. 28.

judges and the juries, the reasoning has often seemed to revolve in a circle, and to utterly deprive the clause of any practical application. The juries say, *because* a man killed himself otherwise than accidentally, *therefore* he must have been insane; and the judges say, *if* a man was insane when he killed himself, the policy is not forfeited. Under such a condition of things there is, practically, no case left to which the clause can apply, even though the courts lay down correct rules as to the effect of evidence, which has been by no means always the case.[1]

§. 245. **Present Form of English Policies.**—The English companies insert no clause of forfeiture for self-destruction in policies issued upon the life of a person other than the one who procures the insurance, while in policies obtained by persons upon their own lives, the condition forfeits the policy in case of self-destruction, without reference to sanity or in-

[1] As to proof and presumption with reference to insanity and suicide, see Chapter on Evidence.

In their endeavor to protect themselves, insurers have recently adopted various modifications of the clause as to suicide. The American Popular of New York, has adopted a clause which seeks to provide an outward test of insanity, which is to preserve the policy from forfeiture. It is as follows: "Or if he shall, whether sane or insane, die by his own hand, unless such death shall be caused by an act committed while in a state of insanity, which insanity shall, prior to the commission of the act, have been detected and announced by a physician professionally attending him." Another company has adopted a clause which meets the case with precision, leaving little room for misconception by court or jury. It makes the policy void "in case the said person shall die by his or her own hand or act, whether sane or insane," but adds a proviso that in case he or she "shall die by his or her own hand or act while insane, the *net* reserve on this policy at the date of death, first deducting any notes or other indebtedness due the said company on account of this policy, reckoned according to the 'combined experience' or 'extreme rate of mortality,' with interest at four per cent. per annum, shall be returned to the holder of this policy."

If the companies continue to think it important to except from losses insured against any kind of self-destruction, we believe they must make some such change in the terms of the exception inserted in their policies. The question of the propriety of any such exception is not a legal one. It may be observed, however, that the argument sometimes used, that the mathematical calculations of the life insurance companies, upon which their premiums are reckoned, are based upon the ascertained deaths from all causes, and that, therefore, liability to death by self-destruction is included mathematically in their premiums, would apply with equal force against the exception as to death by the hands of justice, in a duel, or in violation of law. It was suggested by Maule, J., in Borradaile v. Hunter, that the purpose of preventing an inducement to suicide would be attained by providing that in case of death from that cause the liability of the company should be limited to the sum for which the policy could have been sold immediately before the death.

sanity, unless it has passed by assignment, equitable or actual, to some third party for a pecuniary consideration, in which case it is held good for the amount of the interest of the third party. Under policies of this nature, several cases have arisen. One of these was Moore v. Woolsey,[1] where a husband was bound by his marriage settlement to secure £5,000 to his wife; but some years after marriage, he being unable so to do, it was arranged that the wife should, from her own property, keep up policies to be effected on her husband's life, in which he was to have no interest. The husband, in pursuance of this arrangement, insured his life by a policy which provided that if he should die by his own hand, it should be void, so far as his executors or administrators were concerned, but should remain in force only to the extent of any *bona fide* interest acquired by any person under an actual assignment by deed for a valuable consideration in money, or by way of security or indemnity, or by virtue of any legal or equitable lien as security for money, upon proof of the extent of such interest being given to the satisfaction of the company. The policy was at once handed over to a trustee for the wife, and the wife paid the premium. On the husband's death by his own hand, it was held that the wife's trustee had a *bona fide* interest in the policy, by virtue of an equitable lien as security for money, within the meaning of the policy.

In this case, the objection was taken, that such a clause was void as against public policy, inasmuch as it might furnish an encouragement to suicide. But Lord Campbell said: "It is argued, that if this be the true construction of the eighth condition, this condition is void, and, indeed, that the whole policy is vitiated, on the ground that it would offer encouragement to suicide. If a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy—as the owner of a ship, who insures her for a year, cannot recover upon the policy if,

[1] 4 E. & B. 243; s. c. 24 L. J. Q. B. 40; 1 Jur. N. S. 468; 28 Eng. Law & Eq. 248.

within the year, he causes her to be sunk. A stipulation that, in either case, upon such an event, the policy should give a right of action, would be void. But where a man insures his own life, we can discover no illegality in a stipulation that, if the policy should afterwards be assigned *bona fide* for a valuable consideration, or a lien upon it should afterwards be acquired *bona fide* for valuable consideration, it might be enforced for the benefit of others, whatever may be the means by which death is occasioned. No authority has been cited in support of the position that such a condition is illegal; and the frequent introduction of it into life policies, indicates the general opinion that it is unobjectionable. The supposed inducement to commit suicide under such circumstances cannot vitiate the condition more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind. That the condition under discussion may promote evil, by leading to suicide, is a very remote and improbable contingency; and it may frequently be very beneficial, by rendering a life policy a safe security in the hands of an assignee."

§ 246. In another case an insurance company advanced money to a person on mortgage of real estate, and on his taking a policy on his life, which was deposited with the company as collateral security. The policy was by its terms to be void in case of death by suicide, "except to the extent of any *bona fide* interest therein which at the time of such death shall be vested in any other person or persons for his, her, or their own benefit for a sufficient pecuniary or other consideration." The assured having committed suicide while insane, it was held that the assured and the company stood in the same position as if the policy had been mortgaged to a third person, and that it was valid to the extent of the mortgage

debt.[1] But where the policy provided that it should be void in case of suicide, "but if any third party have acquired a *bona fide* interest therein by assignment, or by legal or equitable lien for a valuable consideration, or as security for money, the assurance" "shall nevertheless to the extent of such interest be valid and of full effect," and the assured became bankrupt and committed suicide, and after that assignees were appointed, to whom the estate of the assured passed by operation of law, it was held that the assignees could not recover under the policy, as the exception in favor of third parties referred only to assignees by contract, not to an assignment by operation of law.[2] Where the policy was to be forfeited in case of insanity unless it had been "legally assigned," it was held that the words meant "validly and effectually assigned," and that an equitable charge on the policy made by deposit was enough.[3]

§ 247. **Self-destruction by a Sane Man.**—No case has arisen in which the question of liability has been presented in the case of self-destruction, where there was no allegation of insanity, unless that of Hartman v. The Keystone Insurance Company is such an one.[4] But, from the report, such does not appear to have been the question disputed. The policy was, by its terms, to be avoided if the insured "shall die by his own hand, in or in consequence of a duel," &c. He was insured March 26th, about noon, and died during that night, about half past three o'clock, of arsenic, which he was shown to have bought in the morning before obtaining insurance. It was also shown, that after purchasing the arsenic, and in the negotiation for the policy, he inquired as to the effect upon the policy, if the person insured committed

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[1] White v. British Empire Mut. L. Ass. Co. 7 L. R. Eq. 394; s. c., 38 L. J. Ch. 53; 17 W. R. 26; 19 L. T. N. S. 306.

[2] Jackson v. Forster, 1 El. & El. 463. See Jones v. Consol. Inv. Ass. Soc. 26 Beav. 256; s. c. 5 Jur. N. S. 214; 28 L. J. Ch. 66; Solic. & Gen. L. Ass. Soc. v. Lamb, 2 De G. J. & S. 251; s. c. 10 Jur. N. S. 739; 33 L. J. Ch. 426; 12 W. R. 941; 10 L. T. N. S. 702.

[3] Dufaur v. Prof. L. Ins. Co. 25 Beav. 599; s. c. 4 Jur. N. S. 841; 27 L. J. Ch. 817.

[4] 21 Penn. State, 466.

suicide, and had also declared his intention to commit suicide. It seems to have been contended that the clause quoted required that the death "by his own hand" must be in or in consequence of a duel, and that death by his own hand in any other manner, did not forfeit the policy. But the court held, that the clause "die by his own hand," must be disconnected from those which follow. "Standing alone, they mean any sort of suicide. Besides this, the court was very plainly right in charging that if no such condition had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life, that his representatives cannot recover for that reason alone."[1]

§ 248. The passage already quoted from Moore v. Woolsey,[2] shows Lord Campbell's opinion, that self-destruction by a sane man avoids the policy, whether there is a clause to that effect or not; and such is the admission, tacit or expressed, of nearly all the cases referred to. Self-destruction by a sane man is a felony.[3] It therefore comes within the doctrine laid down in Fauntleroy's case.[4] It is, moreover, obviously a death occurring in the known violation of law.[5]

§ 249. In Horn v. Anglo-Australian & Universal Family Life Assurance Co.,[6] there was no provision as to suicide in the policy. It seems to have been admitted that the insured was insane when he killed himself, but it was argued that on grounds of public policy the contract was avoided by suicide, as that was a felony, and the case was assimilated to Fauntleroy's case, where his execution for a felony was held to forfeit the policy,[7] but Wood, V. C., expressly repudiated the

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[1] In Mut. L. Ins. Co. v. Terry, 15 Wall. 580, Hunt, J., referring to this case, speaks of "the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy."

[2] *Ante*, § 245. [3] 2 Bishop on Crim. Law, § 387, 448, 450, 642. [4] *Ante*, § 223.

[5] *Ante*, § 218. See Prince of Wales Ass. Co. v. Palmer, 25 Beav. 605. In England the attempt to commit suicide is constantly punished as a crime. In this country there appears to have been no attempt to punish in such a case except in Com. v. Dennis, 105 Mass., 162, and there it was held that the statute law had abolished the common law on this subject.

[6] 30 L. J. Ch. 511; s. c. 7 Jur. N. S. 673; 9 W. R. 359; 4 L. T. N. S. 142.

[7] 4 Bligh, N. S. 194; s. c. 2 Dow & Cl. 1; *ante*, § 223.

doctrine that public policy forbade insurance against insanity. After a reference to Fauntleroy's case as deciding that, "although nothing was said in the policy one way or the other, the law would infer as a condition that the execution of the assured in 'consequence of a crime committed by him,' was not one of the cases in respect of which the policy would become payable," he says: "The argument might be pursued, although I do not know that any case has so decided, to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony and losing his life thereby." He continues, "I have no doubt in my own mind that there is no principle of public policy which interferes to prevent a person insuring against the consequences of his insanity, in whatever unhappy form it might develop itself, just as he might insure against any other calamity by which his life would be determined." There can be no doubt that a person cannot recover on a policy upon the life of another whose death he has caused.[1]

§ 250. **Self-destruction by Drunken Man.**—In Equitable Life Assurance Society v. Paterson,[2] it was held that if the assured drank to intoxication, and while in that condition, by accident or mistake took an overdose of laudanum, it was not a dying by his own hand in the sense of the policy, even though the mistake or accident was in some sense occasioned by the drunkenness; but if he took the laudanum with intent to destroy his life, it was immaterial that he was drunk at the time, and the policy was avoided. "An accident, even though it be the result of that loss of perception produced by drink, cannot fairly be called the product of intent. But if the intent in fact exists, the other fact that the man was maudlin from drink, and could have no intelligent conception of his surroundings, does not help the case, since the drunkenness is his own act."

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[1] In Reed v. Royal Ex. Ass. Soc. Peake's Add. Cas. 70, such seems to have been the defence.

[2] 41 Geo. 338.

§ 251. **Intemperance.**—Where a policy provided that it should be void[1] if the insured died by reason of intemperance, from the use of intoxicating liquors, the jury were instructed as follows: "If you find that Miller's death was produced by other causes, then you should find for the plaintiff." "The policy must be construed strictly against the defendant, and if you find that Miller's death was only contributed to by the intemperate use of liquors, then you must find for the plaintiff." "In order to avoid the policy, the defendant must satisfy you by a preponderance of evidence, that the sole or paramount cause of Miller's death was caused by the intemperate use of intoxicating liquors." On appeal, the defendants claimed that if intemperance shortens life, it is a cause of death within the meaning of the policy; but the court held the charge to the jury correct. They say that "it rarely, if ever, happens that the intemperate use of intoxicating drinks is indulged in for a considerable period without to some extent shortening life. * * The proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate, or predisposing cause. When several causes contribute to death as a result, it may be externally difficult to determine which was the remote, and which the immediate cause, yet this difficulty does not change the fact that the death is to be attributed to the proximate and not to the mediate cause. Nor is the difficulty in questions of this kind any greater than that which arises in questions of negligence, contributory negligence, and many others which are constantly the subjects of judicial investigation."

On a subsequent trial of the case, it was held[2] that

[1] Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins. Law Jour. 25.

[2] 34 Iowa, 222; s. c. 1 Ins. Law Jour. 747. In this case the court say: "In our opinion the verdict cannot be sustained; it is palpably and grossly in conflict with the evidence, and could only have been rendered under the influence of passion or prejudice. Upon the question involving the cause of the death of Miller, the testimony points but one way; that he died from intemperance in the use of intoxicating liquors, there can be no honest reasonable doubt. There is nothing within the whole record that can be dignified into the importance of creating a conflict of evidence on this point. He was shown to have been an intemperate man for years, often given to paroxysms of gross intoxication.

evidence that the insured died from a cause occasioned or produced by his excessive use of intoxicating liquors, will support the defense that he died from intemperance, and therefore, where the insured having escaped from those having him in charge, while he was in a fit of *delirium tremens*, ran into the open air and through the streets, in inclement weather, without clothing, and it was shown that such exposure contributed to his death, these facts supported the defense.

In an unreported case[1] the policy provided that the insurers should not be liable if the insured should "die by reason of intemperance from the use of intoxicating liquors;" and there was evidence to establish that he did so die, and that he had delirium tremens or *mania a potu*, caused by such intemperance, and that such disease is often fatal. It was also in evidence that morphine, amongst other medicines, was administered in large quantities by the physician called

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He would drink to insensibility, and protract these debauches until nature failed to supply strength necessary to enable him to continue his indulgences. He had seasons of sobriety which would continue for months. His debauches were not very protracted as to time, but most violent in excess. In one of these, after having spent two or three days at a 'saloon,' drinking as was his wont on such occasions, and leaving it neither at night nor in the day-time, he was assisted home by the one who had dealt out to him the poisonous beverage, and supplied with a bottle of liquor to which he could have access at his own house. Soon after a physician was called in who found him suffering from an attack of *delirium tremens*. He rapidly grew worse and died from the disease. The physician testifies that his death was caused by the disease just named, which was the result of the intemperate use of intoxicating liquors. Not a single witness gives evidence contradicting the foregoing statement of facts. The only testimony that forms even the basis of an argument in support of the verdict of the jury, is the affidavit of the physician (the same who attended him in his last sickness) to the effect that he died of exposure and intemperance. The affidavit was prepared and used to establish Miller's death upon application to the defendant for payment of the policy. The physician also, in his evidence, at the trial, stated he had died of congestion of the lungs and brain, caused by excessive indulgence in the use of intoxieating liquors. In explanation of the evidence it is shown that Miller, in his delirium, escaped from those having charge of him, and was thereby exposed in his underclothes, while running at large in the city, to the inclemency of the weather. It further appears that congestion of the lungs and brain was a consequence of his indulgence in intoxicating liquors, and was an attendant of the disease produced thereby. All that can be said of this evidence, giving it the weight and effect claimed by plaintiff's counsel, is that Miller died of congestion, or from exposure, both of which were the direct consequences of his intemperate use of intoxicating liquors. This conclusion sustains the defense that he died from intemperance.

[1] Ranney v. Mut. Ben. L. Ins. Co. U. S. C. C. Mass. stated May on Ins. 333.

to take care of him, as a remedy. The plaintiff claimed that the treatment was improper, and that if the insured had *delirium tremens*, his death resulted directly and immediately from the excessive amount of opium administered, and not from the disease. The defendants requested the court to rule that "if the assured, by intemperance caused by the use of intoxicating liquors, brought upon him a disease, fatal in its nature, and a physician was called in who, in good faith and with intent to cure, administered medicines which in fact contributed to, or even caused the death of the insured," he could not recover. This instruction was refused, but the court did instruct the jury as follows: "The real question in this case is, whether intemperance from the use of intoxicating liquors was the cause of death. If the disease from which the insured was suffering was *delirium tremens* or *mania a potu*, or other disease resulting from intemperance from the use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application, or neglect of proper care or treatment, produced exhaustion or fever and consequent death, the death would properly be considered as resulting from the intemperance, even if the disease were not so mortal in itself, but that with good care and under favorable circumstances the insured might have recovered; yet if it became the cause of death by reason of the most efficacious mode of treatment not having been adopted, then the plaintiff would not be entitled to recover. If the death of the assured was caused by any drug administered to him in the course of medical practice for the purpose of cure in sufficient quantity to produce death, and death was the effect of the drug and not of the disease, then, in such case the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquors, and the plaintiff upon that branch of the case would be entitled to recover." And the court further instructed the jury "that they were to consider whether the insured caused his own death by the use of intoxicating drinks, or whether the physician caused the death by the use of narcotic drugs; whether

the death resulted from that alone, or whether the man was in a condition in which they failed to relieve him from the disease, and left the disease to cause the death itself; or whether it was of itself the active and immediate cause of the death, and he would have recovered but for that, is a question of fact for your determination."

§ 252. **"Habitual" Use of Liquors.** — Where the policy provided that if the insured should die from the habitual use of intoxicating liquors the policy should be void, it was held[1] that the word "habitual" was material. "I do not suppose that if a uniformly temperate man should be overcome with liquor, and die in consequence of a single debauch, he could be said to die in consequence of the habitual use of liquor. But it is not for me to say how long the use of liquor must be considered to make it habitual. You are to judge of this fact as of any other fact in the case. The law very frequently requires juries to find what is a reasonable time; there are numerous instances where juries are called upon to examine questions of that sort. And so you are to determine in case this man did die by use of intoxicating liquor, whether it had become habitual or whether it was a temporary thing, and you are also, permit me to say, permitted to find, if you choose, that the use of liquor between the 5th and 24th, or, if you choose, to find that the use of liquor for three

[1] De Camp v. N. J. Mut. L. Ins. Co. 3 Ins. Law Jour. 89, U. S. C. C. South. Dist. of N. Y.

The case of N. York L. Ins. Co. v. Graham, 2 Duvall, 506, was one where the defendants endeavored to prove that the deceased died from intemperance, which under the terms of the policy would have released them from liability. It would appear that he was suffering from delirium tremens, and that chloroform was administered to him in considerable quantities, and that the jury found that the latter, rather than intemperance, was the immediate cause of death, though the court say that had no chloroform been administered and he had then died, there could have been scarcely a doubt that delirium tremens was the sole cause of the death.

In Conn. Mut. L. Ins. Co. v. Siegel, 1 Am. Law Rec. 762, Ky. Ct. of Appeals, the policy was by its terms to be void in case the insured should "become so far intemperate as to impair his health or induce delirium tremens."

In Buchanan v. Ætna L. Ins. Co. U. S. C. C. East. Dist. of Mo. the defense was a violation of the policy, because the insured had, after its issue, become so far intemperate as to impair his health seriously and permanently and to induce delirium tremens, and there was a verdict for the company.

weeks is a habitual use, you are permitted to do so. It is a thing entirely within your power. The testimony of the defendants is, that the death was caused by the excessive use of alcoholic liquors and opiates, and that statement is contained in the physician's certificate of death, and is exactly or substantially contained in the verdict of the coroner's jury. Now, in regard to the manner of his death, if De Camp used liquors habitually and excessively, and used opiates also, for the purpose of allaying the excitement of the liquor, and they combined to cause and did cause his death, and the liquor, directly, materially and effectually contributed to his death, then the policy was avoided. If you find that he used an undue quantity of liquor habitually, and in the wild and excited state which liquor created resorted to over-doses of opiates to produce quiet, and so, from the combined effects of these stimulants and narcotics died—and observe this: if you find that the stimulants, that is liquors, directly, materially and effectively contributed to his death, then the policy is not binding upon the company."

§ 253. **Other Provisions of the Policy.**—Where there was a condition that fraud or false swearing in the proofs should forfeit all claim under the policy, it was held that the fraud or false swearing must be wilful with reference to a material matter, and with intent to deceive.[1] The policy contained in the premium clause the words, "in consideration of the quarterly premium of $30 24, to be paid on or before the 28th days of November, February, May, and August," and in the payment clause the words, "the balance of the year's premium, if any, being first deducted," and it was held[2] that the contract was for a yearly premium in quarterly instalments, and the death occurring subsequently to the August payment, a deduction of the subsequent November, February and May instalments should be allowed.

§ 254. **Indisputable Policies.**—Some companies issue poli-

[1] Marion v. Great Repub. (F.) Ins. Co. 35 Mo. 148.
[2] Hesterberg v. Equitable L. Ins. Co. 1 Cincin. 483.

cies which are represented to be "indisputable," though the practice is more common in England than in this country. In some cases they are made absolutely indisputable, but more generally they amount to an agreement that the company will not avail itself of any defense resting on certain specified grounds, or that, after the policy shall have been in force for a certain period, it shall be indisputable for any cause growing out of any alleged error or misrepresentation in the application. We have seen one American policy which had indorsed upon it at the time of its issue, "This policy is indisputable for any cause whatever."

As to these "indisputable policies," Mr. Bunyon says with great force:[1] "It is clearly open to the parties to contract where no representations whatever are made by the assured, or for the insurers to issue the policy free from all conditions. The object of the assured in such a case is to obtain an assurance representing an unconditional obligation to pay on the occurrence of the event. This is readily carried out; the difficulty is to combine therewith the preliminary investigation by the assurers, through the medium of the assured and his agents, without which it is obvious that the company cannot safely issue the policy. The problems then present themselves for solution, how far the preliminary investigation can be the basis of the contract prior to the issue of the policy, and yet be separated from the contract when completed; and, if this is not possible, how far the proposal may itself be modified, so as to prevent its importing any condition into the contract. The two questions must be considered together. It is clearly open to the assured to stipulate that any information given by him shall not be taken to be a representation, the truth of which is to be imported as a condition into the policy, as for example, he may state it 'to the best of his belief,' or simply as a fact, 'of which he has been informed.' He may also, it would seem, stipulate, that, tendering general information, he is not to be held answerable for the unintentional suppression of a material fact

[1] P. 88.

within his knowledge. Here would appear to be the limit of his power of controlling the effect of his own acts and statements. Such a course could not make the policy indisputable, and its application is no new invention. The insurers may, however, agree that they will not take advantage of any unintentional error, misrepresentation, omission or mistake, made by him, or even of the fraud of third parties, of which he is not cognizant, to avoid the policy. And this appears to be the effect of these conditions.[1] An agreement that the insurer will not raise any objection, even in the case of direct personal fraud, is a void condition. It has even been questioned whether it would not be sufficient to render the policy itself wholly void *ab initio* as an illegal contract. In these cases, then, fraud, if not mentioned, must be assumed to be excluded, since that construction is always to be preferred, which will support a contract, and it is never to be supposed that the parties to it intend an illegal stipulation, where a lawful meaning can be given to their words. Of course, this construction cannot make the policy really indisputable, for it leaves open the question whether the statement or omission complained of, was fraudulent or not, and also what is the true meaning or construction of the policy itself. In one company, claiming for its policies the title of indisputable, the principle of indisputability was attempted to be carried out by the following proviso: 'That every policy issued by the company shall be indefeasible and indisputable, and the fact of issuing the same shall be conclusive evidence of the validity of the policy; and it shall not be lawful for the company to delay payment of the money assured thereby, on the ground of any error, mistake or omis-

[1] Lord Campbell says, Wheelton v. Hardisty, 8 E. & B. 232, 283, that "a provision that all assurances shall be unquestionable means indisputable," and amounts to "an absolute guaranty that no objection shall be taken to defeat the policy on the death of the party whose life is insured, subject to the implied exception of personal fraud, which will vitiate every contract."

In re Gen. Prov. Life Ass. Co. 18 Week. Rep. 396, the policy was indisputable, and admitted on the face of it the truth of the statements in the proposal; yet it was held void for concealment.

sion, however important, made by or on the part of the person or persons effecting such insurance; and that, on the contrary, the amount so assured shall be paid at the time stipulated by the policy, as if no error, mistake or omission had been made or discovered.' * * * The clause, moreover, does not include misrepresentations, although not fraudulent, unless the words 'error or mistake' are sufficient, which seems doubtful. Neither does it prevent the insurers raising any question as to what is the true nature of the contract proposed by the policy. It is important to remark, that indisputable policies contain the usual conditions as to residence, maritime risks, suicide and military service, while a really indisputable policy should be subject to no conditions whatever. Such policies could not be indiscriminately issued except at an advanced rate of premium. Residents in the tropics, and persons whose lives were subject to more than ordinary risk, would otherwise all seek such an office, and its funds would soon be unable to meet the demands upon them."

§ 255. Mr. Bunyon also refers to a practice originally introduced by the Scotch companies by which, after a policy has been in existence a certain number of years, it is transferred to a class of "Select Assurances," in which it is provided that only certain conditions shall be applicable, all others being released by an express certificate, and in the first class of such "Select Assurances" the only condition retained is that as to the payment of the premium, while in the second class the conditions as to residence and military service are retained. Mr. Bunyon adds: "It is obvious that such a release as is contained in the certificates stands upon a very different ground to that of the indisputable clause in the policy already considered. There can be no doubt but that the right to set aside a contract may be released, even although that right may have arisen by reason of the fraud of the releasee. At the same time, they are in principle open to this objection, that, by a general rule of law, releases given by persons not cognizant of their rights are inopera-

tive. When the policy is void on account of the fraud of the assured, the author presumes that such a release could not improve his position if given by the insurers, so long as they were ignorant of the fact."[1]

§ 256. **Non-Forfeitable Policies.**—Companies frequently announce that their policies are "non-forfeitable," or "non-feitable for any cause whatever." The precise meaning of these phrases is not clear. It is presumed, however, that they would be held to mean that such a policy is not to be rendered void by any act occurring after its issue. Such phrases without limitation would waive all the conditions contained in the policy as to residence, travel and occupation. They might even be held to waive the condition as to the payment of the premium, though perhaps the interpretation would be, that, in case of failure to pay, some allowance should be made on account of premiums previously paid. These suppositions are made on the assumption that companies actually issue policies answering to the description contained in their advertisements, or that they are bound by their announcements,[2] but we have seen no policies which did not introduce words of limitation.

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[1] In Wheelton v. Hardisty, 8 E. & B. 232, the prospectus of the company stated that their forms had been revised, "so that all assurances with the association shall be unquestionable, except where fraud has been practiced in obtaining them." The court say: "It would seem hardly consistent with the safety of the company if they were absolutely to agree that the policies should be unquestioned in case of fraud by the referees or life. We should, if necessary, be disposed to hold that the fraud of the life or referees was a fraud within the exception in the prospectus."

It seems to us that the practice referred to in the text might well be introduced into this country. After a policy has been in existence five years or more the company should have been able to satisfy themselves as to the correctness of the representations upon which it was granted, and might fairly undertake, after such period, to indorse upon it a waiver of any defense grounded upon the representations contained in the application, if satisfied that no fraud was committed.

[2] See remarks as to the effect of a company's prospectus considered in the chapter on Evidence.

CHAPTER VII.

PROOFS OF DEATH.

§ 257. **General Rule as to Proofs.**—After a death has occurred the provisions of the policy as to presenting proof of that fact to the company must be complied with. The requirements upon this subject vary considerably in the policies of different companies. In some a particular form of proof is specified in the policy, but more frequently the only reference to such proofs is by a clause which fixes the time when the money is to become payable, as a specified period after the presentation of proofs. In whatever form such a requirement is contained in the policy it is a condition precedent which must be strictly complied with, and where the liability to pay does not accrue till a time limited after such proofs are furnished, no action can be maintained until they are furnished and the time limited has elapsed, unless there has been a waiver of one or both conditions.[1] A compliance with this condition will not be excused by anything less than an act of God rendering compliance impossible. Thus where a policy issued by an Accident Insurance Company made it a condition precedent to a recovery that a notice, specifying the particulars of the accident, should be delivered within seven days after its occurrence, it was held that this provision applied even in a case where, owing to

[1] Taylor v. Ætna L. Ins. Co. 13 Gray, 434; Worsley v. Wood, 6 T. R. 710; Mason v. Harvey, 8 Exch. 819; Roper v. Lendon, 1 El. & El. 825; s. c. 28 L. J. Q. B. 260; Davis v. Niagara (F.) Ins. Co. 49 Me. 282; Owen v. Farmers' Joint Stock Ins. Co. 57 Barb. 518; s. c. 10 Abb. N. S. 166, note; Home Ins. Co. v. Duke, 3 Ins. Law Jour. 365, Ind.; Mitchell v. Home Ins. Co. 32 Iowa, 421; Woodfin v. Asheville Mut. Ins. Co. 6 Jones Law, 558, where the condition was in a by-law which was held to be binding on the assured. It would seem that where an action is brought on a parol contract, proofs of death must be presented in the same manner as if a policy had been issued. McCann v. Ætna (F.) Ins. Co. 3 Ins. Law Jour. 149, Nebraska.

the sudden operation of the accident and its resulting in instantaneous death, there was nobody capable of giving the required notice, because no survivor knew of the existence of the policy, and yet it was not a case where the act of God had rendered notice impossible, for the assured might have provided for the contingency, and informed some one of the existence of the policy.[1] It has, however, been held by the Supreme Court of the United States, under a fire policy, that if the assured is insane, the presentation of proofs is excused.[2] But the proviso requiring proofs will be construed liberally, and, unless the policy in terms calls for specific information the requirement will be satisfied by furnishing such reasonable evidence as the party can command at the time to give assurance to the company of his right to receive the money, and of their liability for the loss;[3] and it need not be in the precise words specified in the policy,[4] though there must be a substantial compliance both in its contents, and in the mode of giving it. A requirement of notice does not call for proofs of loss.[5]

§ 258. **Time of presenting Proofs.**—In a case in Indiana,[6] the policy required that notice of the death should be given to the company at Chicago, as soon thereafter as possible, and on the trial evidence was presented showing that the death occurred about six miles, or about an hour and a half of easy travel from the post-office of the plaintiff, from which place there was a daily mail to and from Chicago, and that one day was sufficient time for him to go or send to Chicago; that the plaintiff was engaged at his home when the death occurred, and that there was no obstacle in the way of his going or sending to the office, other than his ordinary farming operations, and that he neither gave nor caused any

[1] Gamble v. Accident Assurance Co. 4 Irish R. Com. Law, 204.
[2] Germania F. Ins. Co. v. Boykin, 1 Ins. Law Jour. 208.
[3] Walsh v. Washington M. Ins. Co. 32 N. Y. 427.
[4] Ætna F. Ins. Co. v. Tyler, 16 Wend. 385; Cornell v. Le Roy, 9 Wend. 163.
[5] Tooley v. Hartford Pass. Ass. Co. 2 Ins. Law Jour. 275, U. S. C. C. S. D. of Ill.
[6] Provident L. Ins. & Inv. Co. v. Baum, 29 Ind. 236.

notice of the death to be given to the company until eight or ten days after the death; but it was also proved that the policy was, during all that time, in the trunk of deceased, at Chicago, and had never been in the possession of, or seen by the plaintiff, till the end of the eight or ten days, and that when he then notified the company of the death, the officers gave him a blank form for an affidavit in regard to it, and stated to him that it would be sufficient if he made it out and returned it within three or four weeks, which he did. Upon the evidence the court charged the jury that "the fact that the plaintiff did not know of the condition in the policy of insurance, in regard to notice to the company of the death, * * * excused the plaintiff from such notice, until after he was informed of such condition, and the failure to give notice for such time, under such circumstances, is no ground of defence. I do not mean to say that he could wait indefinitely, but that, if he, within a reasonable time, procured the policy, and on the same day gave the company verbal notice of the death, and the company then gave him a blank form of a notice without objection as to the time, and he was, until that time, ignorant of that condition, it may be considered by the jury in deciding whether he gave the defendant notice of the death within proper time; and the jury may also take into consideration the action of the company, and the time of such action after notice, to learn the circumstances of the death. Immediate notice means notice within a reasonable time under all the circumstances." On appeal this charge was held correct.

In other cases, it has been held that "forthwith" means within a reasonable time;[1] that notice of a loss which occurred on the 10th, mailed on the 11th, and received on the 15th, was sufficient;[2] that notice mailed on the 23d, of a loss which occurred on the 15th, and was known to the insured on the 18th, was a compliance with a condition requiring notice

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[1] Woodfin v. Asheville Ins. Co. 6 Jones Law, 558.

[2] Schenck v. Mercer Co. M. F. Ins. Co. 4 Zab. 447.

forthwith,[1] though eleven days' delay has been held not an "immediate" notice, no excuse for the delay being shown,[2] and notice given six days after an accident has heen held[3] not to be "immediate notice" under an accident policy, an agent of the company having been at the time accessible to the insured; but on the other hand, where notice of the death with full particulars of the accident was required to be given "as soon thereafter as possible," it was held that notice within a week and affidavits furnished within six weeks, were in time.[4]

If an application for insurance contains an agreement that the assured will be "bound by the act of incorporation and by-laws of the company," and the policy issued thereon recites that the company will be liable "according to the true intent and meaning of said act of incorporation and by-laws," and refers to the application as binding upon the assured, under the limitations and conditions expressed in the by-laws, the assured must comply with the conditions of the by-laws relative to giving notice and making proof of loss, and if the by-laws provide that every one sustaining loss "within thirty days shall file with the secretary a particular account of the amount," &c., the omission to do so for seventeen months will discharge the policy.[5] Where the policy makes no provision as to the time for presenting proofs, all that the insurer can require is that they be presented in a reasonable time.[6] It may be observed that whether proofs were furnished "as soon as possible" is a matter for the jury,[7] and that the sufficiency of preliminary proofs and what amounts to a waiver are questions of law, but whether such proofs were furnished, and whether the acts were done which constitute a waiver are questions of fact.[8]

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[1] N. Y. Cent. (F.) Ins. Co. v. Nat. Prot. Ins. Co. 20 Barb. 468.

[2] Trask v. State F. & M. Ins. Co. 29 Penn. 198.

[3] Railway Pass. Ass. Co. v. Burwell, 8 Ins. Law Jour. 281, Ind.

[4] Providence L. Ins. & Inv. Co. v. Martin, 32 Md. 310.

[5] Smith v. Haverhill Mut. F. Ins. Co. 1 Allen, 297.

[6] Killips v. Putnam F. Ins. Co. 28 Wisc. 472.

[7] Providence L. Ins. & Inv. Co. v. Martin, 32 Md. 310.

[8] Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith 268, 288. As to the effect of proofs of death, as evidence, see Chapter on Evidence.

§ 259. **Mode of Presenting Proofs.**—Where the policy required the insured to "deliver in" a particular account of the loss, and also provided that "all communications and notices to the company must be postpaid and directed to the secretary at" a place named, and the statement of the loss was so sent but never received, it was held that the provision of the policy that a statement should be delivered in had not been complied with.[1] So, if the policy requires notice in writing to the secretary, parol notice to an agent is not sufficient.[2] But it has been held that where proofs are deposited in the mail, it is presumed they reach their destination in due course unless evidence to the contrary is given.[3]

§ 260. **Contents of Proofs**—Unless the policy expressly provides what the proofs shall contain, the company cannot require any particular kind of proof. In Taylor v. Ætna Life Insurance Co.,[4] Metcalf, J., says: "By the terms of the policy the sum insured was payable in ninety days 'after due notice and proof of the death' of Andrew Taylor. Such notice and proof were therefore prerequisite to the maintenance of this action. The defendants, in their answer, deny that they were furnished by the plaintiff with such proof. They admit, however, in the statement of facts, that there was no defect in the proof of said Taylor's death, unless, in order to constitute due proof thereof, it was necessary to produce a sworn certificate, such as is hereinafter mentioned, of the physician who attended the deceased in his last sickness. The ground taken by the defendants is, that such certificate is a requisite and essential part of the preliminary proof of the death, and made so not only by the terms and reasonable intendment of the contract contained in the policy, but also by their own usage and understanding, and the usage and understanding of other life insurance companies. To sup-

[1] Hodgkins v. Montgomery Co. Mut. (F.) Ins. Co. 34 Barb. 213. See also Railway Pass. Ass. Co. v. Burwell 3 Ins. Law Jour. 281, Ind.

[2] Patrick v. Farmers' (F.) Ins. Co. 43 N. H. 621.

[3] Killips v. Putnam F. Ins. Co. 28 Wisc. 472.

[4] 13 Gray, 434.

port this ground of defense, the defendants have introduced (the plaintiff's counsel consenting) a pamphlet issued by them, which they were accustomed to give to claimants on their policies, and which, it is admitted by the plaintiff, was given to him by the defendants at the time when he presented to them his proof of Andrew Taylor's death. Under the head of 'Proofs of Death Required,' that pamphlet contained among other required proofs the following: '1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death.' It was also a part of said required proof that the certificate 'should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation.' * * The policy does not embody nor refer to any by-law, requisition, usage, or understanding of the defendants as to the kind of proof which they should require of the death of Andrew Taylor. Whatever, therefore, might be such by-law, requisition, usage, or understanding, the plaintiff would not be bound thereby. He is bound only by the policy itself, that is, to furnish 'due proof' of the death. If the defendants would have bound the plaintiff by their by-laws, &c., they should have made the policy in terms subject to those by-laws, or in some way have made them a part of the contract contained in the policy. The question, what is due proof, is to be determined by the court, according to the rules of evidence, and not by the defendants, nor by any other life insurance companies. We are not informed what proof of death was presented to the defendants, and it is not necessary that we should know; for it is conceded by them that the proof was sufficient, if the physician's certificate was not a requisite part of it. The usage of the defendants to require certain specified proof of death has been relied on in argument. In the first place, no such usage is duly shown. In the next place, if it were so shown, there is no pretence that the plaintiff had any notice of it when he took the policy. He, therefore, for that reason, if for no other, could not be bound by it."

§ 261. **Proofs Need not Disclose Interest.**—Unless the policy requires it, it is not necessary to show to the company in the preliminary proofs, that the claimant had an insurable interest in the life of the deceased.[1] In the case cited, Woodruff, J., says: "No preliminary proof of interest was, by the conditions of the policy, to be furnished. The exhibition of proofs to the defendants on this subject, was not made a condition precedent to the title of the plaintiff to demand payment. By the terms of the policy, the sum insured was made payable within sixty days after notice and proof of death. However true it may be that no recovery can be had if the plaintiff had no insurable interest, it in no wise follows that, if he had an insurable interest, his right of action was not perfect in sixty days after proof of the death. That was the only preliminary proof prescribed in the contract, and if the defendants thought proper to make any further condition, requiring proof of any other matter, they did so at their own peril. The plaintiff's right of action was complete (if he had an insurable interest) when he had complied with the conditions of the policy, although he commenced his action at the peril of being defeated, if it appeared on the trial that his contract was a mere wager. I find nothing in the cases cited by the counsel for the appellants inconsistent with this view. They are cases in which the question, as to sufficiency of proof, related to proof of interest *on the trial*, or where it was made one of the conditions of the policy, that the sum insured should only be payable after proof of loss, which proofs were to be accompanied by particulars showing the extent of the loss sustained, the situation and value of the property, and the like. Such a condition is common in fire and marine policies, and when inserted, is to be complied with; otherwise there is no such precedent condition, and the parties respectively prosecute and defend upon the usual terms. If the plaintiff establishes his case on the trial, he recovers, and cannot be defeated because he did not prove

[1] Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith, 268; Smith v. Ætna L. Ins. Co. 5 Lans. 545; s. c. on appeal, 49 N. Y. 211.

his claim to the satisfaction of the defendants before he commenced his action. * * The defendants agreed to pay to the plaintiff 'one thousand dollars within sixty days after due notice and proof of the death of the said Ralph;' and how many soever the other particulars may be, which the plaintiff must establish before he could enforce that contract, it was no part of the contract that he should exhibit his evidence to the defendants before the trial."

A provision in an accident policy, that no claim shall be made unless the injury "shall be caused by some outward or visible means, of which proof satisfactory can be furnished," does not require such proof to be furnished before the trial,[1] and a provision that all claim shall be forfeited unless full particulars of the accident and injury shall be furnished without suppression of any material fact, is not broken by a failure to disclose injuries happening subsequent to the accident, by which the original injury is aggravated.[2]

§ 262. **Contents of Proofs.**—Where the policy required that the proof of death should contain "the name of the physician or physicians and other persons in attendance, and the place and date of burial, * * the affidavit of the medical attendants, &c.," it was claimed that the preliminary proofs were deficient, because they did not contain the affidavit or certificate of Dr. Bartlett, as one of the attending physicians; but the court held,[3] that, "Although he had been a practicing physician, Dr. Bartlett was not such at the time of the death of Gibson, and had not been for some years previously. He was one of the sympathizing friends, who, on occasions of accident or death, are present to give aid and comfort. Mrs. Gibson immediately on the arrival of her husband despatched a messenger for Dr. Meacham, the family physician. In the meantime, the wounded man being in great pain, some person suggested that Dr. Bartlett had better make an examination of his wounds; Mrs. Gibson assent-

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[1] Railway Pass. Ass. Co. v. Burwell, 3 Ins. Law Jour. 281, Ind.

[2] Rhodes v. Railway Pass. Ins. Co. 5 Lans. 71.

[3] Gibson v. Am. Mut. L. Ins. Co. 37 N. Y. 580.

ing, he did so, and he also gave him morphine to relieve his pain. Upon the arrival of Dr. Meacham, he took charge of the case. It does not appear that Dr. Bartlett acted in any other than a friendly capacity, or that he has at any time desired or expected compensation for his services. I do not know that he could claim compensation in money for his kind offices, any more than could the other neighbors present and assisting. The service was charitable and voluntary. The defendant did not make any request that this question should be submitted to the jury, but claimed, as a matter of law, that Dr. Bartlett was an attending physician. This claim cannot be sustained."

§ 263. Where it was a condition of the renewal of the policy, that in case of death, proof of health at the time of renewal should be furnished before an action was brought, and incomplete affidavits were presented to the company, the court say,[1] that when they are "read in connection with the fact that the death was only about two months after the renewal, and that the affidavit distinctly refers to the same diseases (as the cause of his death) which are mentioned in the original declaration (the basis of the policy), and states that he had not been considered dangerously sick more than a week, it is not too much to say that here is a plain implication that might well be deemed by the company to satisfy their requirement. Having themselves seen the assured after the renewal was made, in their office, and conversed with him on the subject, and being now furnished with the affidavit of two persons that though his disease was of the character from which he suffered even when the policy was originally effected, yet he had not been considered dangerously ill more than a week, they had no occasion to require any other or further evidence that, at the time of the renewal two months before, he was in the good health contemplated by the policy and its conditions. Although the affidavit is not specific to the point, there was enough in it to invite the

[1] Peacock v. N. Y. L. Ins. Co. 1 Bosw 338, *ante*, § 103.

attention of the company thereto, and if they were not satisfied, they should have suggested the objection."[1]

But where the policy requires the certificate of the nearest magistrate, it must be procured; and where there are two magistrates near, the question of distance is material.[2] So also where certain statements are required in the proofs.[3]

§ 264. **Form of Notice.**—A notice required by the policy need not be in writing unless it expressly so requires;[4] where the policy requires a statement signed and sworn to by the assured, it is sufficient if it is signed and sworn to by his agent who procured the policy and had the custody and management of the property.[5] Notice given by the agent of the company, at the request of the assured, is sufficient, although it does not appear in the notice that it was given by such request.[6] So notice to a local agent, who at once transmits it, is good;[7] and where a third party left affidavits with the insurers of the death of the insured, in connection with another policy on the same life held by him, and the plaintiff notified the office of the death, and referred to the affidavits for proof, it was held sufficient.[8] Where the assured attempted to comply with the conditions as to proofs of loss by serving his own affidavit, which was defective, but the company subsequently made an investigation, and took additional affidavits, it was held that the insured might get the benefit of these affidavits as parts of his proofs of loss.[9]

§ 265. **Assured not Estopped by Statements in Proofs.**—It

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[1] See Manhattan L. Ins. Co. v. Francisco, 2 Ins. Law Jour. 926; Supreme Ct. of U. S.

[2] Prot. (F.) Ins. Co. v. Pherson, 5 Ind. 417; Noonan v. Hartford F. Ins. Co. 21 Mo. 81; O'Neil v. Buffalo F. Ins. Co. 3 Comst. 122; Roumage v. Mech. F. Ins. Co. 1 Green, 110; Leadbetter v. Ætna (F.) Ins. Co. 13 Me. 265. But see Turley v. N. A. F. Ins. Co. 25 Wend. 374; Ætna F. Ins. Co. v. Tyler, 16 Wend. 386.

[3] Scott v. Phœnix (F.) Ass. Co. 1 Stuart, Lower Can. 354.

[4] Sexton v. Montgomery Co. Mut. (F.) Ins. Co. 9 Barb. 191.

[5] Sims v. State (F.) Ins. Co. 47 Mo. 54.

[6] Stimpson v. Monmouth Mut. F. Ins. Co. 47 Me. 379.

[7] Germania F. Ins. Co. v. Curran, 8 Kans. 9; Killips v. Putnam F. Ins. Co. 28 Wisc. 472.

[8] Loomis v. Eagle L. & Health Ins. Co. 6 Gray, 396.

[9] Sexton v. Montgomery Co. M. (F.) Ins. Co. 9 Barb. 191.

seemed at one time to be held that the assured is bound by the statements contained in the proofs presented by him, unless before a trial he notifies the company of some error in them, and cannot otherwise be permitted to contradict them at the trial,[1] but the current of recent decisions is to hold the contrary.[2] The difference in the decisions upon this point is perhaps in some degree to be accounted for by the differing language of the policies, while what is said in the earlier cases is to some extent *obiter*.[3] In a case, however, where it should conclusively appear that the company not only defended the action, but, relying upon a defense clearly shown by the proofs of loss, refrained from setting up another available defense, it is by no means certain that the doctrine of *estoppel in pais* would not be applied against the assured. In every case the proofs presented by or on behalf of the plaintiff operate at the trial as admissions against him.[4]

[1] Campbell v. Charter Oak F. & M. Ins. Co. 10 Allen, 213; Irving v. Excelsior F. Ins. Co. 1 Bosw. 507.

[2] McMaster v. Ins. Co. of N. A. 64 Barb. 536; affirmed on appeal, 3 Ins. Law Jour. 273; Parmelee v. Hoffman (F.) Ins. Co. 3 Ins. Law Jour. 111, N. Y. Cm. of Ap.; Germania (F.) Ins. Co. v. Curran, 8 Kans. 9; Hubbard v. Hartford F. Ins. Co. 33 Iowa, 325; De Camp v. N. J. Mut. L. Ins. Co. 3 Ins. Law Jour. 89, U. S. C. C. S. D. of N. Y.; Comm. (F.) Ins. Co. v. Huckberger, 52 Ill. 464; N. A. Ins. Co. v. Burroughs, 28 Leg. Int. 342, Penn. See Conn. Mut. L. Ins. Co. v. Siegel, 1 Am. Law Rec. 762, Ky. Ct. of Appeals.

[3] These points are considered in McMaster v. Ins. Co. of N. A. 3 Ins. Law Jour. 273.

[4] N. Y. Cent. (F.) Ins. Co. v. Watson, 23 Mich. 486; s. c. 1 Ins. Law Jour. 162; also cases under note 1. But see Newton v. Mut. Ben. L. Ins. Co. 2 Dill. 154.

CHAPTER VIII.

WAIVER AND ESTOPPEL IN LIFE INSURANCE.

§ 266. As has already been observed, a company may waive any ground of forfeiture or defense.[1] Provisions declaring policies void in certain contingencies, are inserted for the benefit of the insurers, and though the language in such cases usually is, that the policy "shall be void," not "shall be voidable," yet, it is a provision inserted for the benefit of the company, and may be waived by it.[2] It may also waive a strict compliance with the conditions of the policy as to proofs of death. Such waiver may be made by express words or by acts, and it may be either by its immediate officers or by its agents. A waiver in express terms by immediate officers presents no question of difficulty. It obliterates the past so far as anything has occurred to forfeit the policy. But a question sometimes arises where the waiver is alleged to consist in the acts of the company, though those acts may have been done with no intention of waiving anything. When the waiver is alleged to have arisen from the acts of an agent, the further question of his power to waive is also involved, which is considered when treating of the powers of agents generally.

§ 267. **Principles of Waiver and Estoppel.**—An important distinction exists in cases of waiver which has not always been observed by the courts. If the company, by its acts or declarations, induces a person to believe that his policy is

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[1] See as to waiver in warranty, §§ 71 to 75; waiver of payment of premium, §§ 154, 157 to 164, 189 to 194; as to waiver after death, §§ 195, 196, 197; as to waiver of conditions in the policy, §§ 209 to 217.

[2] Atlantic (F.) Ins. Co. v. Goodall, 35 N. H. 328; Buckbee v. U. S. Ins. Ann. & Tr. Co. 18 Barb. 541; Viele v. Germania (F.) Ins. Co. 26 Iowa, 9; Cartwright v. Gardner, 5 Cush. 273.

still in force, or that proofs of death are sufficient, the company may very properly be held to have waived any defense on those grounds, or rather, to be estopped from setting up any such defense. They have, by their acts, induced the assured to do or to refrain from doing something, and he is or may be damaged thereby. So, if there is a new consideration, that alone makes the waiver binding. But where, at the time the acts were done or the declarations made by the company, which are alleged to constitute a waiver or estoppel, the assured could not, in consequence thereof, by any possibility have been damaged, there is in law no waiver. For instance, if, after a death has occurred, the company, under an error of fact or law, treats the policy as having been in force at the time of the death, there is no reason why they should be held to have waived a defense that the policy was not in force, or be estopped from setting up such a defense, for it was not possible for the assured, at that time, by any act of his, to have given efficacy to the policy.[1] If, however, after a forfeiture, the company, with knowledge of the fact, receives a premium, or if after death it treats proofs as sufficient, the presumption is, that they have or may have misled the assured, and the company cannot avoid the effects of its own conduct.

In short, it is believed that a waiver must be founded on a valuable consideration,[2] or the act relied upon must be substantially an estoppel,[3] and an estoppel requires three things:

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[1] Greenfield v. Mass. Mut. L. Ins. Co. 47 N. Y. 430; *ante*, § 203; Trask v. State F. & M. Ins. Co. 29 Penn. 198.

[2] Farm. & Merch. (F.) Ins. Co. v. Chestnut, 50 Ill. 111.

[3] Ripley v. Ætna Ins. Co. 30 N. Y. 136, 164; Phillips, § 10. In Ripley v. Ætna Ins. Co. the court say: "If my tenant agrees to pay me rent on a day named or his lease will be forfeited, and, if before the day, I agree, for a valuable consideration, to waive the condition, I am bound by the agreement. If, without consideration, I agree that he may pay after the day, and he, by reason thereof, omits to pay at the day, I am estopped from enforcing a forfeiture. But if, without consideration, I assent to a waiver of payment at the day, but before the day withdraw my assent, and insist on performance in such season as to enable him to perform, I am not estopped." But see Dohn v. Farmers' Joint Stock (F.) Ins. Co. 5 Lans. 275. See also Murphy v. People's Equit. Mut. F. Ins. Co. 7 Allen, 239, where it was held that a vote authorizing officers to settle a loss, and partial payments made under a process of attachment, together with statements of various offi-

first, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or which he had reason to believe could influence his conduct, which act or omission is inconsistent with the evidence he proposes to give, or the title he proposes to set up; second, that the other party has acted upon, or been influenced by such act or declaration; and, third, that the party will or may be prejudiced by allowing the truth of the admission to be disproved.[1]

In Kelly v. Solari,[2] an action was brought to recover back money which had been paid on a lapsed policy in ignorance or forgetfulness of the fact that it had lapsed, and it was held that such an action could be maintained. If, therefore, money actually paid over on a lapsed policy may be recovered by the company, *a fortiori* no act less than a payment, no expression of willingness to pay, no tender of payment can be considered a waiver of the defense that the policy had lapsed.[3]

§ 268. **What Constitutes a Waiver as to Proofs of Death.**—Ordinarily mere silence is not enough to constitute a waiver, but there must be some act, though to constitute a waiver of defects in proofs of death the act may be exceedingly trivial,[4] indeed in some cases language is used which seems to imply that mere silence, especially if prolonged, is sufficient to constitute a waiver or to justify the jury in finding one.[5] If in

cers to the insured that his claim ought to be paid, do not estop the company from defending, on the ground of misrepresentation in the application, unless it appears that the assured has forborne any rights or changed his position in reference to his claim, in consequence of their acts and declarations.

[1] Brown v. Bowen, 30 N. Y. 519. See also Simpson v. Accidental Death Ins. Co. 2 C. B. N. S. 257.

[2] 9 M. & W. 54; approved in Kingston Bank v. Eltinge, 40 N. Y. 391, and in Union National Bank v. Sixth National Bank, 43 N. Y. 452.

[3] Greenfield v. Mass. Mut. L. Ins. Co. 47 N. Y. 430.

[4] Keenan v. Miss. State Mut. (F.) Ins. Co. 12 Iowa, 126; Ayres v. Hartford F. Ins. Co. 17 Iowa, 176.

[5] Smith v. Ætna L. Ins. Co. 5 Lans. 545; Kimball v. Hamilton F. Ins. Co. 8 Bosw. 495; Peacock v. N. Y. Life Ins. Co. 1 Bosw. 338; Lewis v. Monmouth Mut. F. Ins. Co. 52 Me. 492; Bartlett v. Union Mut. F. Ins. Co. 46 Me. 500; Great Western (F.) Ins. Co. v. Staaden, 26 Ill. 360; Bilbrough v. Metropolis (L.) Ins. Co. 5 Duer, 587; Killips v. Putnam F. Ins. Co. 28 Wisc. 472; Post v. Ætna (F.) Ins. Co. 43 Barb. 351; Walker v.

the proofs an offer is made to supply "any other information that may be required," the mere retention of the proofs is a waiver, though the policy provides that no waiver shall be made except in writing,[1] as to proofs of death. With reference to a waiver of defects in proofs of loss, it has been held that a refusal to pay placed on other grounds is a waiver.[2] So is a proposal to settle,[3] an absolute refusal to pay on the merits,[4] a denial of all liability,[5] a payment of part of the loss,[6] a negotiation without objection with the assurer,[7] a refusal to pay on the ground that the policy was forfeited,[8] and an expression of satisfaction with the proofs.[9] So an objection taken to one defect waives others.[10] Promising to send an agent to prepare the necessary papers waives any defect in notice,[11] and promising to consider the claim on its merits

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Mut. (F.) Ins. Co. 26 Me. 371. See *In re* Republic Ins. Co. 3 Ins. Law Jour. 390, U. S. C. C. N. D. of Ill.

[1] Pitney v. Glenn's Falls F. Ins. Co. 61 Barb. 335.

[2] McMasters v. Westchester Co. M. (F.) Ins. Co. 25 Wend. 379; Rogers v. Traders' (F.) Ins. Co. 6 Paige, 583; Lewis v. Monmouth Mut. (F.) Ins. Co. 52 Me. 492; Miller v. Eagle L. & Health Ins. Co. 2 E. D. Smith, 268; Vos v. Robinson, 9 Johns. 192; Savage v. Corn Ex. F. & I. Nav. Ins. Co. 4 Bosw. 1; Blake v. Exchange Mut. (F.) Ins. Co. 12 Gray, 265; Bumstead v. Dividend Mut. (F.) Ins. Co. 2 Kern. 81; Tayloe v. Merchants' F. Ins. Co. 9 How. U. S. 390; O'Neill v. Buffalo F. Ins. Co. 3 Comst. 122; Francis v. Somerville Mut. (F.) Ins. Co. 1 Dutch. 78; Schenck v. Mercer Co. M. F. Ins. Co. 4 Zab. 447; Franklin F. Ins. Co. v. Coates, 14 Md. 285; Globe (F.) Ins. Co. v. Boyle, 21 Ohio St. 119; Taylor v. Roger Wms. (F.) Ins. Co. 51 N. H. 50; Franklin F. Ins. Co. v. Chicago Ice Co. 2 Ins. Law Jour. 609, Md.

[3] Byrne v. Rising Sun (F.) Ins. Co. 20 Ind. 103; Lewis v. Monmouth Mut. F. Ins. Co. 52 Me. 492; Van Deusen v. Charter Oak (F.) Ins. Co. 1 Abb. N. S. 349; *contra*, where before suit brought, and subsequent to an offer of settlement, notice was given of intent to rely on defects in the proofs, Noonan v. Hartford F. Ins. Co. 21 Mo. 81.

[4] Francis v. Ocean Ins. Co. 6 Cow. 404; Manhattan (F.) Ins. Co. v. Stein, 5 Bush, 652; McBride v. Republic F. Ins. Co. 30 Wisc. 562.

[5] Manhattan (F.) Ins. Co. v. Stein, 5 Bush, 652; Hartford Prot. (F.) Ins. Co. v. Harmer, 2 Ohio State, 452; Norwich & N. Y. Transp. Co. v. Western Mass. (F.) Ins. Co. 6 Blatch. C. C. 241; Tayloe v. Merchants' F. Ins. Co. 9 How. U. S. 390; O'Neill v. Buffalo F. Ins. Co. 3 Comst. 122; N. Y. L. Ins. Co. v. White, 2 Ins. Law Jour. 917; s. c. 2 South. Law Rev. 549.

[6] Westlake v. St. Lawrence Co. Mut. (F.) Ins. Co. 14 Barb. 206.

[7] Bartlett v. Union Mut. (F.) Ins. Co. 46 Me. 500.

[8] Noyes v. Wash. Co. Mut. (F.) Ins. Co. 30 Vt. 659.

[9] Atlantic (F.) Ins. Co. v. Wright, 22 Ill. 462.

[10] Ayres v. Hartford F. Ins. Co. 17 Iowa, 176.

[11] Works v. Farmers' Mut. F. Ins. Co. 57 Me. 281.

waives any defect in proofs,[1] and an admission that it was only the quantity and value which was disputed waives other defects.[2] Making erasures in the proofs and then retaining them is a waiver.[3] Where the magistrate's certificate was defective, the company were not allowed to insist upon the defect after having refused to return it for correction.[4] So language which induces the insured not to serve his proofs within the time limited is a waiver.[5]

§ 269. If, after receiving the preliminary proofs, the officers visit the premises and converse with the insured, and make no reference to the preliminary proofs, nor raise any objection to them while any defect therein may be remedied, and refuse to pay on other and distinct grounds, the insurance company will be estopped to set up any defect in the proofs, although the conditions made part of the policy give explicit directions about proofs of loss, and the policy provides that no condition, stipulation, covenant, or clause in the policy shall be altered, annulled, or waived, except by writing indorsed on or annexed to the policy and signed by the president or secretary.[6] In this case the court say: "Upon the happening of the loss, the plaintiff sent to the defendants certain notices and proofs in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice to the insured. If they failed to do so, if they proceeded to negotiate with the plaintiff without adverting to the defects, if, still further, they put their refusal to pay on other and distinct grounds, they are, upon familiar principles of law, estopped to set up and rely upon the defective notices; the law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary. If the defendant relied upon any exemption from the obligations

[1] Hartford Prot. (F.) Ins. Co. v. Harmer, 2 Ohio State, 452.
[2] Rathbone v. City F. Ins. Co. 31 Conn. 193.
[3] Winneshiek (F.) Ins. Co. v. Schueller, 1 Ins. Law Jour. 761, Ill.
[4] Turley v. N. A. F. Ins. Co. 25 Wend. 374.
[5] Dohn v. Farmers' Joint Stock Ins. Co. 5 Lans. 275.
[6] Blake v. Exchange Mut. (F.) Ins. Co. 12 Gray, 265.

of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification or addition, by indorsement upon the policy. But the question whether a stipulation, as to notice and proofs of loss, has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question is not open."

§ 270. **Waiver of Limitation as to Time.**—Where a policy provided that the loss was to be paid within ninety days after proofs should be completed, and required that any action should be commenced within six months after the loss, and the loss occurred on July 5, and on July 14 proofs were served, and a defect was pointed out on October 7, which was supplied on October 14, and on January 2, the secretary, on being applied to for payment, said payment would not be made till January 14, when it would be made, it was held that an action commenced on January 18, could be maintained, though the six months from the time of the loss had expired on January 5, for the company had lulled the plaintiff into inactivity, and were held to have waived the condition as to time.[1] Where a loss was payable in sixty days after it was ascertained and proved, and within that time proof was given, and the company admitted a loss and made an offer of part but refused to pay the whole, it was held that this was a waiver of the limitation as to the time, and that the money was due on demand.[2] So a denial of all liability, made after inquiry into the loss, on the ground that the loss is not within the policy, is a waiver of a clause requiring proofs, and of a condition that no action should be

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[1] Ames v. N. Y. Union (F.) Ins. Co. 4 Kern. 253. See *post*, Chapter on Time and Place of Enforcing Claims.

[2] Baltimore F. Ins. Co. v. Loney, 20 Md. 20.

brought for sixty days after presentation of proofs, for in such a case the presentation of proofs would be an idle formality.[1]

§ 271. **What is not a Waiver as to Proofs of Death.**—But a refusal to pay, because others had sued, with the declaration that the company would do nothing while these suits were pending, is not a waiver of a clause limiting the time within which an action could be maintained.[2] So where the president, on being asked what further proofs were needed, answered that the policy would show, it was held that there was no waiver of any defect in the proofs already furnished, nor of other proofs.[3] Insurers who apprise the claimant that his papers are not proof and refer him to the policy, are not held to have waived the defect because they did not go further and specify it; or because they at the same time, took other objections to being held liable.[4] The court say: "We have, then, the case of preliminary proofs, very defective in a particular distinctly required by a provision of the policy, and of the officer of the company warning the claimants that the papers were not proofs; that he must look to their sufficiency himself, apprising him also of the intention to contest the claim and to keep the party out of it for a long time, if not altogether, and an assertion that the company owed the claimants nothing; with an admission that if there was any loss, it was total, and an intention to defeat the claim, if it could be done. * * The results, which a careful examination of the authorities will lead to, seem to me to be these: That the courts have a decided tendency to exact from insurers that they should distinctly specify an intention to rely upon any defects in these preliminary proofs. Silence, when they are furnished, especially if accompanied with the plain assertion of a distinct ground of defense, or a general denial of their liability, will ordinarily amount to a waiver. And we see that the reason of this is, the tendency to mislead

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[1] Norwich & N. Y. Transp. Co. v. Western Mass. (F.) Ins. Co. 6 Blatch. C. C. 241.

[2] Ripley v. Ætna (F.) Ins. Co. 30 N. Y. 136.

[3] Spring Garden Mut. (F.) Ins. Co. v. Evans, 9 Md. 1.

[4] Kimball v. Hamilton F. Ins. Co. 8 Bosw. 495.

the claimants. But I have not found a case—I doubt if any is to be found—holding that the assurer who apprises the assured that his papers are no proofs, and refers him to the policy, is bound to go further and specify the particular defects. No case has decided that if he apprises the insured that he will rely on the defect of proofs, he waives this objection by taking others which he insists will defeat the recovery. The company told Van Tuyl, in very explicit language, that his proofs were worthless, and they should resist payment. How could the company be deemed to have acquiesced in what they reject and declare to be insufficient? How did their officers, in any way, mislead the party when they told him to look to his policy, and to himself to find defects which they averred to exist."[1] Where a policy required first a notice of loss and then a particular account of the loss, it was held that a waiver of notice did not include a waiver of the particular account.[2] A vote to postpone indefinitely the subject of a loss, is not a waiver of conditions requiring notice of loss.[3]

§ 272. **Waiver of Forfeiture of Policy.**—As to a waiver of a forfeiture of the policy, the courts seem to require more positive affirmative action than in the case of proofs of death. In general, it may be said that any acts, declarations, or course of dealing by the insurers, with knowledge of the facts constituting a breach of any condition, recognizing and treating the policy as still in force, and leading the assured to regard himself as still protected thereby, amount to a waiver of the forfeiture and estop the company from setting it up.[4] In one case, it has been intimated that where an increase in the risk gave the company a right to cancel it, a mere failure to cancel, after a knowledge of the facts giving the right so to do, is a waiver of the forfeiture.[5] The receipt of pre-

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[1] To same effect, Citizens' F. Ins. Co. v. Doll, 35 Md. 89; but see O'Connor v. Hartford F. Ins. Co. 31 Wisc. 160.

[2] Desilver v. State Mut. (F.) Ins. Co. 38 Penn. 130.

[3] Patrick v. Farmers' F. Ins. Co. 43 N. H. 621.

[4] Viele v. Germania (F.) Ins. Co. 26 Iowa, 9; see *ante*, §§ 189 to 193, 210.

[5] Viele v. Germania (F.) Ins. Co. 26 Iowa, 9.

mium, with knowledge of the facts constituting a forfeiture, is, as already shown, a waiver;[1] and this is true, even though the company had no actual knowledge of such facts, but received the money without inquiry from its agent, who had such knowledge.[2] Receiving payment of a premium estops the company from denying the authority of the agent through whom received,[3] or that the policy covered the property.[4] A renewal of a policy made with a knowledge of misrepresentations in the application for the original policy is a waiver,[5] as is indorsing a consent to an increase of risk.[6] Where the assured and an agent of the company were alleged to have committed a fraud in procuring the policy, it was held that the receipt by the company of a subsequent premium, after they had acquired a knowledge of the fraud, was a waiver of it, the court saying that to permit the company, after so receiving the premium, to deny the validity of the policy, "would be a fraud which would immeasurably transcend in turpitude the original fraud of the assured, waived and condoned, for a valuable consideration, as that has been by the company."[7] But where an agent himself pays the premiums, after the forfeiture has occurred, and the company receives them, not knowing of the forfeiture, even assuming that the agent by some transactions with the assured had become entitled to the policy, he cannot avail himself of the alleged waiver by the company, as to do so would be to avail himself of his own wrongful act.[8] The receipt of premiums and sending an agent to

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[1] *Ante*, §§ 194 to 197, North Berwick Co. v. N. E. F. & M. Ins. Co. 52 Me. 336; Liddle v. Market F. Ins. Co. 29 N. Y. 184; Ames v. N. Y. Union Ins. Co. 4 Kern. 253; Lycoming (F.) Ins. Co. v. Slockbower, 26 Penn. 199.

[2] Wing v. Harvey, 5 De G. M. & G. 265; s. c. 27 Eng. Law & Eq. 140; Hodsdon v. Guardian L. Ins. Co. 97 Mass. 144.

[3] Northwestern Ins. Co. v. Ætna F. Ins. Co. 26 Wisc. 78.

[4] Block v. Columbian (M.) Ins. Co. 42 N. Y. 393.

[5] Witherell v. Maine (F.) Ins. Co. 49 Me. 200; Carroll v. Charter Oak (F.) Ins. Co. 38 Barb. 402; s. c. in Court of Appeals, 10 Abb. N. S. 166; 1 Abb. Ct. of App. Cas. 316.

[6] Rathbone v. City F. Ins. Co. 31 Conn. 194.

[7] Armstrong v. Turquand, 9 Irish Law, N. S. 32; s. c. 3 Irish Jurist, N. S. 450.

[8] Busteed v. W. of Eng. F. & L. Ins. Co. 5 Irish Ch. R. N. S. 553.

investigate a loss is a waiver of a condition that the application must be sent to the secretary of the company before the risk is assumed.[1] So the receipt by a general agent of premiums after knowledge that other insurance had been obtained is a waiver of a condition requiring written notice and indorsement on the policy, even where the policy provided that there could be no waiver except by a writing signed by the secretary.[2] Where the company required written notice of certain facts, but they issued a policy after having had verbal notice only, and subsequently issued a renewal policy, it was held the requirement was waived.[3] Receiving payment of a note after a loss is not a waiver of a provision that the risk shall be suspended so long as a note remained unpaid, and such receipt does not make the company liable for a loss which occurred while the note was unpaid.[4] Any extension of time to pay, given with knowledge on the part of the company of the non-payment of a premium note when due, was held[5] in one case to be a waiver of the forfeiture, but this decision was reversed on appeal, though not on grounds which expressly touched this point.[6] At any rate the soundness of the position may well be doubted. An adjustment of the loss and a promise to pay has been held to be a waiver in a case where the court could say there was a consideration for the new promise of the company to pay, to be found in the consent of the assured to take less than he claimed.[7] But an assent by the company to the appraisement of the amount of the loss, does not imply a waiver of a forfeiture, especially when the

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[1] Ins. Co. of N. Am. v. McDowell, 50 Ill. 120.

[2] Carroll v. Charter Oak (F.) Ins. Co. 10 Abb. N. S. 166; s. c. 1 Abb. Ct. of App. Cas. 316; below 38 Barb. 402; 40 Barb. 292.

[3] Ames v. N. Y. Union (F.) Ins. Co. 4 Kern. 253.

[4] Williams v. Albany (F.) Ins. Co. 1 Mich. Nisi Prius, x; Wall v. Home (M.) Ins. Co 36 N. Y. 157.

[5] Baker v. Union Mut. L. Ins. Co. 6 Abb. N. S. 144; s. c. 6 Rob. 393.

[6] 43 N. Y. 283; see *ante*, § 187. Various cases of waiver of the payment of premium have been stated in treating of the duration of the risk. Others will be found in the sections relating to the limitation of actions.

[7] Farm. & Merch. Ins. Co. v. Chesnut, 50 Ill. 111.

ground of forfeiture was not known to the company at the time of the assent.[1]

§ 273. Imposing or collecting an assessment in a mutual company after the company has acquired the knowledge of facts entitling the company to claim a forfeiture of the policy, is a waiver of the forfeiture,[2] but where the directors ordered an assessment to be made on "all policies in force," and the secretary included a forfeited policy, and the assessment on it was paid, it was held that this was not a waiver of the forfeiture.[3]

§ 274. **Waiver by Accepting Policy.**—A person who accepts a policy, which recites that it is made upon the application filed with the company, is estopped from denying that the application is his, and cannot allege that it was made by an agent employed by him to procure insurance, but not authorized to bind him by representations in the application.[4] If a person procures a policy on his life through an agent of the company, receives and retains a policy, which agrees in all respects with his written application, and pays a second premium without objection, he cannot afterward be permitted to disaffirm the contract, and recover back the premiums upon proof that the agent, at the time the proposal was made and the first premium paid, agreed, in consideration of the premium, to procure a different kind of policy, and the general agent, when the policy was delivered and complaint was made that it was not in proper form, promised that the company would make it all right.[5]

§ 275. In Sweeney v. Promoter Life Assurance & Annuity Co.,[6] the defendant pleaded to an action on the policy that

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[1] Baer v. Phœnix (F.) Ins. Co. 4 Bush, 242.

[2] Frost v. Saratoga (F.) Ins. Co. 5 Denio, 154; Cumb. Val. Mut. Prot. (F.) Co. v. Mitchell, 48 Penn. 374; Viall v. Genesee Mut. (F.) Ins. Co. 19 Barb. 440; Elliott v. Lycoming Co. Mut. (F.) Ins. Co. 66 Penn. 22.

[3] Diehl v. Adams Co. Mut. (F.) Ins. Co. 58 Penn. 443.

[4] Draper v. Charter Oak F. Ins. Co. 2 Allen, 569.

[5] Mecke v. Life Ins. Co. of N. Y. 8 Phila. R. 6. See Franklin F. Ins. Co. v. Hewitt, 3 B. Mon. 231.

[6] 14 Irish Law, N. S. 476.

there was a false statement as to age, to which the plaintiff replied, that before and at the time of effecting the policy, he was in communication with the defendants, and that he derived all his information, as to the age of the insured, from them. The company demurred, on the ground that this was a departure in pleading, and also an attempt to vary a sealed instrument by parol; but the court held, that the alleged representation contained matter which at law would be a subject of cross action, and was, therefore, properly the subject of an equitable replication, as showing that the defendants ought not, in good conscience, to be allowed to plead such a defense.

CHAPTER IX.

THE AGENTS OF THE PARTIES TO THE CONTRACT.

§ 276. The business of life insurance is carried on exclusively by corporations or associations, which must from their very nature act solely through agents, who possess powers more or less extensive. In considering the powers of such agents, it is to be remembered, first, that the powers of the officers and agents of a corporation are limited by the charter of the company, and that they neither can have in fact, nor has any one dealing with them any right to suppose that they have, any powers in excess of those given to the corporation by its charter; secondly, that no limitations upon the powers of officers and agents, imposed by any instructions not known to third parties, can be held to limit the powers of such officers or agents when acting within the apparent scope of their authority and engaged in the business for which they are appointed; thirdly, that the incidental powers of agents who have authority to make a contract of insurance, are very different from the powers of those who are only authorized to receive applications for insurance and to forward them.

§ 277. **Corporate Powers.**—So far as relates to the authority of officers and agents, as limited by the corporate powers of the company, it needs only to be added to what has already been said,[1] that if the charter of the corporation expressly, or by necessary implication, forbid any act to be done, no officer or agent who does the act can thereby bind the corporation. But if the charter only designates a certain way in which certain acts may be done, the corporation may still be

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[1] *Ante*, §§ 137 to 141.

bound by the act of its officer or agent who does the act in some other manner, or does some act equivalent in its effects. In practice, however, no questions of corporate power seem likely to arise in the case of life insurance companies.

§ 278. **Powers of Immediate Officers.**—There is little or no practical difficulty, as to the powers of the immediate officers of a company, when exercised at its chief office. The company will be held bound by the acts of its president and secretary performed in its office, whether such acts are in writing or verbal, whether they make a contract, waive a forfeiture or give a consent, unless the person with whom they are dealing knows that their powers are more limited, and even then, if they have been in the habit of performing such acts, or if the company holds them out as having authority to perform them, or does not within a reasonable time repudiate them, the corporation will be bound. But the powers of such officers, away from the office of the company, or when they are not engaged in the business of the company, are more limited.[1]

The tendency of modern decisions is, in accordance with that of modern practice, to recognize the possession by the chief officers of powers which they were not formerly admitted to possess. Thus, while it was held in one or two early cases that the president of a company had not power to waive conditions,[2] it has since been held that the act of a secretary in waiving conditions will be considered authorized, if he has been in the habit of so acting, even though there was no proof of actual knowledge of this practice on the part of the directors,[3] but his admission that the com-

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[1] Trustees of First Baptist Church v. Brooklyn Fire Ins. Co. 28 N. Y. 153; Conover v. Mut. F. Ins. Co. 3 Denio, 254. The decision in Montreal (F.) Ass. Co. v. McGillivray, 13 Moore P. C. 87; s. c. 8 W. R. 165, allows to insurance officers a more limited authority than stated above.

[2] McEvers v. Lawrence, 1 Hoffman Ch. R. 172; Dawes v. N. R. (F.) Ins. Co. 7 Cow. 462.

[3] Conover v. Mut. (F.) Ins. Co. 3 Denio, 254; s. c. 1 Comst. 290; Durar v. Hudson Co. Mut. (F.) Ins. Co. 4 Zab. 171. In Conover v. Mut. (F.) Ins. Co. 1 Comst. 290, it was held that, when a policy of insurance prohibited an assignment of the interest of the assured, "unless by the consent of the company manifested in writing," and the secretary,

pany was liable for a loss is still held not competent evidence to bind the company if made when he is not engaged in the performance of any act relating to his agency,[1] though if the president recognizes property as covered by a loss and directs an entry to that effect to be made in the books, the company is bound.[2]

The question of the powers of the subordinate officers of the company, as the cashier, clerks, &c., when exercised at the

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on an application to him at the office of the company, indorsed upon the policy and subscribed a consent, his authority to do so, in the absence of evidence to the contrary, should be presumed. But, if it were necessary to prove his authority, a formal resolution of the board of directors need not be shown. Evidence that the secretary, he being the sole agent of the company in transacting business at their office, had been in the uniform habit of giving such consent in writing, and made regular entries of his acts in the books of the company, without any objectien or repudiation on the part of the company, is enough at least to carry the question of authority to the jury. Johnson, J.: "The directors were bound to know the uniform course pursued by their sole agent in the transaction of their business at their office, especially where regular entries of his acts were made in their books, and they must be held responsible on the ground of a tacit assent and approval, unless they can show that by a strict vigilance and scrutiny into his acts they were unable to ascertain the course he was pursuing, and could not therefore arrest it or put the public upon their guard. It is enough, it seems to me, that here the party in interest went to the sole place where the business of the company was transacted, and procured what was intended on all hands to be, and I think in effect was, an assent to the execution of the mortgage, as well as the assignment of the policy, from one of the principal officers having the sole charge of the business, and that too in the same form as it had been frequently done there. Incorporated companies, whose business is necessarily conducted altogether by agents, should be required at their peril, to see to it, that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually, and as a part of their system of business, transcend those powers. How else are third persons to deal with them with any degree of safety? They can have no access to the by-laws and resolutions of the board, and no means of judging in the particular instance whether the officer is or is not within the prescribed limits. All that Gridley can be supposed to have known in the case before us would be derived from the face of the policy. There he would only learn that the interest of the insured therein was not assignable without the consent of the company manifested in writing in pursuance of the by-laws and indorsed upon the policy. He accordingly repairs to the office where he had a right to suppose he could have the consent manifested and indorsed in the proper form. It is done according to the system and in the form adopted and uniformly pursued there, by an officer having charge of the business, and who supposed this peculiarly within his province. In the faith that all is right, he advances his money and receives his mortgage and assignment. No objection is made to this, or numerous similar transactions, and even after the fire, payment is refused upon an entirely different ground. Clearly, as it seems to me, the company are not now at liberty to dispute or deny the authority of their secretary to indorse the consent in question."

[1] Trustees of First Baptist Church v. Brooklyn F. Ins. Co. 28 N. Y. 153.

[2] Block v. Columbian (M.) Ins. Co. 42 N. Y. 393.

principal office, is a different one, and is largely influenced by considerations other than those relating to their actual authority.

§ 279. **Law of Massachusetts.**—In Massachusetts, however, the law as to the power of officers and agents is construed much more strictly than in most of the other States, especially in the case of mutual companies. Thus it is held that neither the officers nor the agents of a mutual company have any power to waive conditions of insurance imposed by the policy or by-laws of the company. The ground of the decision being that in such companies the insured constitute the only members, and are affected with notice of, and bound by their rules, which are for the common benefit and protection of all, and that the officers have no other powers than those given by the by-laws.[1] In one case[2] a disposition is manifested to extend the rule to what seems to have been a stock company, though the reason obviously does not apply. The courts of Rhode Island follow the Massachusetts decisions.[3]

§ 280. **Presumptive and Apparent Powers of Agents.**—The questions which arise, in considering the powers of agents of the company, other than its immediate officers, are of much greater difficulty. The agents of life insurance companies are scattered throughout the States in thousands. There are not only local agents appointed in nearly every city and village, but also so-called general agents, who have charge of an entire State or district, and whose actual powers are usually much greater than those of the local agents. The actual powers of such agents, both general and local, may be very different from their apparent powers, and it is therefore essential to remember that so long as the agent acts within the apparent scope of his authority, the company is bound by his acts, though they may be in excess

[1] Hale v. Mech. Mut. F. Ins. Co. 6 Gray, 196; Brewer v. Chelsea Mut. F. Ins. Co. 14 Gray, 203; Baxter v. Chelsea Mut. F. Ins. Co. 1 Allen, 294; Mulrey v. Shawmut F. Ins. Co. 4 Allen, 116; Murphy v. People's Eq. Mut. F. Ins. Co. 7 Allen, 239; Evans v. Trimountain Mut. F. Ins. Co. 9 Allen, 329.

[2] Worcester Bank v. Hartford F. Ins. Co. 11 Cush. 265.

[3] Wilson v. Conway F. Ins. Co. 4 R. I. 141.

of, or in violation of, his real powers[1]—and such powers are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to those with whom he deals.[2] Thus if an agent is in fact authorized to make contracts for insurance in a particular place, the company will be bound by his act in insuring elsewhere.[3] So if an agent habitually exceeds his actual powers, and that fact is known to the company, and they do not publicly disaffirm his acts, they will be bound by them, or rather he will be presumed to have had the powers he exercised.[4] An agent is, moreover, conclusively presumed to have not only the usual and ordinary powers of an agent engaged in the business for which he is appointed, but all the powers necessary and convenient in the execution of his authority.[5] Thus an agent authorized to take applications, may as incidental thereto fill out the formal application and explain its terms, and the company will be bound by his acts while so doing.[6] But an agent cannot bind the company by an unusual contract made in excess of his actual powers, and therefore an agreement to insert a clause, giving the insured the right after a time fixed to surrender the policy and receive back the money paid without interest was held void, though a part of the premium had been paid to the agent in cash, and a note given him for the remainder, which had been passed by the agent to a *bona fide* holder, and paid by the assured.[7] So an agreement to accept the services of the assured as an examiner in payment of the premiums was held void.[8]

§ 281. There is a distinction in law between what are known as general agents,[9] and those known as special agents.

[1] Markey v. Mut. Ben. L. Ins. Co. 103 Mass. 78.

[2] Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222; s. c. 1 Ins. Law Jour. 607.

[3] Lightbody v. N. A. (F.) Ins. Co. 23 Wend. 18.

[4] Illinois F. Ins. Co. v. Stanton, 57 Ill. 354.

[5] Story, Agency, §§ 58, 106.

[6] The question of the effect of a signature by the applicant to the application prepared by the agent is considered later in this chapter.

[7] Tifft v. Phœnix Mut. L. Ins. Co. 5 Alb. Law Jour. 107, N. Y. Supreme Ct.

[8] Buckner v. Grosvenor, MSS. Cincin. Sup. Ct.; Anchor L. Ins. Co. v. Pease, 44 How. 385.

[9] It should be borne in mind that the phrase, "general agent," as used in law, is not

"A special agency," says Story,[1] "properly exists when there is a delegation of authority to do a single act; a general agency properly exists, where there is a delegation to do all acts connected with a particular trade, business, or employment." Under this definition the agents of insurance companies who are scattered over the country would seem to be general agents, not general agents to do all acts connected with insurance, but to do all acts connected with procuring applications for insurance.[2]

In Markey v. Mutual Benefit Insurance Co.,[3] the Supreme Court of Massachusetts define the powers of agents as follows: "The authority of an agent must be determined by the nature of his business, and the apparent scope of his employment therein. It cannot be narrowed by private or undisclosed instructions, unless there is something in the nature of the business, or the circumstances of the case, to indicate that the agent is acting under special instructions or limited powers.[4] On the other hand, it does not follow from the fact that a man is shown to be agent for another or for a corporation, that his principal is bound by all that he does. There are limitations which grow out of the very law of agency. In the first place, the act must appear to be an act of agency, that is, done in behalf of the principal. In the case of corporations created for a special purpose, or engaged in a special business, the authority of the agent will be presumed to be limited by the nature of that purpose or business. So, too, the authority of every agent will be presumed to be limited by the apparent scope of the particular employment or branch of the general business of his principal in and for which he is engaged; and all who deal with him in that relation are affected by such apparent limit of employment and powers. In this case, the authority of Jordan

necessarily nor usually synonymous with the same phrase as used by the insurance companies.

[1] Agency, §§ 17, 126.

[2] Southern L. Ins. Co. v. Booker, MSS. Supreme Court of Tenn.

[3] 103 Mass. 78; see § 158.

[4] To same effect, City of Davenport v. Peoria M. & F. Ins. Co. 17 Iowa, 276.

must be taken to be limited to the business of insurance; and, within that business, by whatever of restriction the fact that his principal is a mutual insurance company may properly impose. The authority of Wells may be still further restricted by the known fact, that he was only a sub-agent, employed to receive applications for insurance and forward them to the company, and to deliver policies issued by the company, and collect premiums thereon. It is not within the apparent scope of the employment of such an agent to make contracts or declarations to bind the company generally; and, therefore, we think the defendants may show the actual extent and limit of his authority."

§ 282. **Division of the Subject.**—The powers of agents of the companies may be conveniently considered under four heads. 1. Their power to bind the company by an original contract. 2. Their power to bind or estop the company by their acts in framing the application, or by their knowledge as to the matters therein referred to. 3. Their power to waive conditions, both before and after the issue of the policy, to give consents, and to accept notice. 4. Their power to renew or restore a lapsed policy, and to waive forfeiture. Under each of these heads, however, there is a difference between the powers of different kinds of agents. An agent who has authority absolutely to issue policies, has obviously far greater powers than an agent whose only authority is to receive applications, and forward them for the approval of the company. An agent, with power to make contracts and issue policies, may, besides making the original contract, waive any condition, or give any consent, for the obvious reason that he has power to make a new contract, which, by its terms or necessary operation, cancels the former. In fact, it seems that such an agent may do anything, with reference to insurance, that the company could do. His consent is sufficient. Notice to him is even said to be sufficient, except where the policy expressly provides for notice to the chief officers, and his waiver of forfeiture is sufficient if he is engaged in the business of the

company when his act is performed. It should be borne in mind that the company may, by words or acts, in some cases by silence, ratify the unauthorized act of its agent. When it does so, the ratification operates from the time of the contract, not from the date of the ratification.[1]

§ 283. **The Power to Bind the Company by an Original Contract.**—The agents of life insurance companies in this country rarely have the authority to conclude absolutely a contract of or for insurance. The only power they ordinarily possess is to procure and receive applications for insurance to be forwarded to the company, without any authority on their part to make a binding contract.[2] In some cases, especially in those of foreign companies, agents have a qualified authority to make their contracts temporarily binding during the period necessary to transmit the application to the company and receive a reply from it.[3] But the usage that an agent of a life insurance company is not given authority to conclude an agreement for insurance is so general that, if such authority is claimed to exist in a particular case, there should be affirmative evidence of such actual authority, or of its repeated exercise with the knowledge of the company. And this evidence must not be merely inferential, as from the fact that the agent is designated as a general agent, for even general agents of life insurance companies have no such power. If, however, an agent is entrusted with policies signed in blank, the company is undoubtedly bound by his act in issuing one of them. In such a case they would be bound by his act in changing the provisions of the printed policy in any manner, even probably in striking out a clause which notifies persons of limitations upon his own powers. Having the signed blank policies in his possession, he may do anything that the immediate officers of the company could do with them. But merely

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[1] Bird v. Brown, 14 Jur. 132.

[2] Lefavour v. Ins. Co. 1 Phila. 558; Brooklyn L. Ins. Co. v. Miller, 12 Wall. 285.

[3] Fried v. Royal Ins. Co. 47 Barb. 127; on appeal, 50 N. Y. 243; s. c. 2 Ins. Law Jour. 120; *ante*, § 150.

furnishing the agent with blank receipts for temporary premiums and blank forms of proposals, has been recently held in England not to give him an implied authority to bind the company, and therefore, though such an agent took the full premium and promised to send a policy, but failed to pay the money over to the company, it was held[1] that the company was not liable, his actual powers being only to receive and forward applications, and to receive a deposit of one-fourth of the probable premium and the proposal containing a provision that the premium was to be paid on receipt of the policy. It may be doubted whether in this country a different conclusion would not have been arrived at.

§ 284. If, however, an agent has power to bind the company, they are bound by his acts, even though he fails to follow the directions given to him by the company, unless the assured is informed of the nature of such directions. Thus, where an agent, appointed to effect insurances in a particular city and its vicinity, insured property at a distance, it was held that the company was bound.[2] If the agent has

[1] Linford v. Prov. Horse & Cat. Ins. Co. 34 Beav. 291; s. c. 10 Jur. N. S. 1066.

[2] Lightbody v. N. A. (F.) Ins. Co. 23 Wend. 18. In this case, the court say: "I shall assume, for all the purposes of this case, that the agent departed from his instructions in taking a risk at Utica. This hypothesis will not aid the defendants. Hayner was a general agent for effecting insurances on behalf of the company, and acted within the general scope of his authority in taking this risk. Although he must answer to his principals for departing from their private instructions, he clearly bound them so far as third persons, dealing with him in good faith, are concerned. The question is not so much what authority the agent had, in point of fact, as it is what powers third persons had a right to suppose he possessed, judging from his acts, and the acts of his principals. This rule is necessary to prevent fraud and encourage confidence in dealing. It is difficult to conceive how the defendants could have conferred a more unlimited authority upon the agent, so far as third persons are concerned, than they did by furnishing him with policies already executed by the officers of the company, and ready to be delivered to any one who might wish to contract, after his name, the subject insured, extent of the risk, and date of the transaction, had been inserted in the contract. The plaintiff had a right to believe that the defendants reposed unlimited confidence in Hayner, in relation to the subject of his agency, and it would be a monstrous doctrine to hold that they may now discharge themselves by setting up their private instructions, which were wholly unknown to the plaintiff when he entered into the contract. The rule is different in relation to a special agent. He cannot bind his principal beyond the precise limit of his authority. But Hayner was a general agent, acting within the scope of his powers; and, if he was wrong in taking this risk, that is a question to be settled between him and his principals."

power to issue policies, he has power to make a parol contract for insurance.[1] Where an agent of a London life insurance company had authority to grant assurances in Australia, and he accepted a proposal through a subagent, whom he had, in fact, no authority to appoint, it was held that the company was bound, though no policy had been issued, and no papers had been received by the company till after the death had occurred.[2]

§ 285. If the agent has authority to issue policies, he may before actual issue do any act with reference to them which the company could do. Having authority to contract, he may, before the delivery is actually completed, modify an intended contract previously reported to and affirmed by the company. Thus where such an agent, about two months after the date of a policy but before its delivery by him, made a change in it,[3] the Supreme Court of Massachusetts say: "These agents were furnished with blank policies, which were to be filled up, indorsed and issued at their discretion. It is fully conceded that, as to the rate of premium, the amount of the risk, and the nature of it, the power of these agents was unlimited. If the memorandum or indorsement of December 8th, 1851, had been made by these agents upon this policy at the time of its original date, and before any other proceedings had taken place, we apprehend it would have been quite clear that it would have constituted a part of the policy, and properly be referred to as explanatory of the nature of the risk. It was not, however, indorsed on the policy at the time that the policy was countersigned by the agent, on the 14th of October, 1851. The question then arises as to the power and authority of the agents to make this indorsement at the later period of December 8th, 1851. Had the plaintiffs received their policy on the 14th of October, 1851, and paid the premium therefor, it might pre-

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[1] Ellis v. Albany City F. Ins. Co. 50 N. Y. 402.
[2] Rossiter v. Trafalgar L. Ass. Assoc. 27 Beav. 377.
[3] Gloucester Man. Co. v. Howard Fire Ins. Co. 5 Gray, 497.

sent a very different question from that now before us, which must be decided upon its own peculiar facts. Among these facts is the important one, that the policy had never been delivered, no premium paid by the plaintiffs, and nothing done which would have secured to the plaintiffs the benefits of the policy, had any loss by fire occurred to the property before the 8th of December. On the last named day, the plaintiffs, upon examination of the policy, as originally prepared, refused to take it in the form in which it then was. At that time no policy had been delivered. These agents were clothed with general powers, as to filling up and issuing policies. Having the authority to make an original contract of insurance, with terms similar to those found in this policy, they had authority, before the delivery of the policy, to enlarge it from its first draft, by a change or modification of the description of the property insured, so as to embrace the case of a building unfinished, but then in the process of construction. This they did, and the policy in this form was accepted by the plaintiffs; and, as between insurers and assured, this contract was entered into on the 8th of December, and is to be treated as of that date. If the agents of the defendants failed to transmit to their principals a copy of the written part of this policy, as it existed at the time of its delivery on the 8th of December, with the change in the description of the state and situation of the property insured, from that which they had forwarded to the defendants in the month of November previous, the responsibility for such omission is not upon the plaintiffs."

Where an agent was authorized to receive applications to be submitted to the company for approval, with power to make them binding until the company's disapproval was communicated to the assured, his agreement to extend an expired policy, when not disapproved, was held good.[1] Where an agent had power to "bind the company during the correspondence," but by his neglect the company did not receive and act upon an application until after the loss had occurred,

[1] Leeds v. Mech. (M.) Ins. Co. 4 Seld. 351.

it was held that the company was liable on his parol contract.[1]

§ 286. **Cannot Insure after a Loss, nor Act for Both Parties.**—But even an agent authorized to make contracts has no authority to make an insurance after the loss has occurred, and therefore, where property was destroyed while the application was in the mail in the course of transmission, and the agent issued a policy after a knowledge of the loss, because he deemed himself bound so to do by some previous dealings, it was held that the company was not liable.[2] Nor can the agent act for both parties, and, if he assumes to do so, the contract is void. Therefore, where the agent of one insurance company reinsured another company of which he was a director and secretary, he acting for both companies, it was held to be a void contract.[3] It is the duty of the agent to acquire the proper information and make the necessary examination to lead to an intelligent decision upon the acceptance or rejection of the risk offered. The company has a right to the exercise of the agent's disinterested skill, diligence, and zeal, for its own exclusive benefit. And while acting as agent, he cannot at the same time take upon himself incompatible duties and characters; or become agent in a transaction where he has an adverse interest or employment. An insurance, produced in that manner, is not avoided on account of the materiality of the relation of the agent to the risk; but because it is against public policy to allow such agreements to stand. An agent cannot therefore insure his own property without the express consent of the company,[4] but where the company on the application of its agent sent to him a policy on his property, and he, on its receipt, made an entry in his account with the company, charging himself with the premium and accepting

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[1] Fisk v. Cottenet, 44 N. Y. 538. [2] Bentley v. Columbia (F.) Ins. Co. 17 N. Y. 421.

[3] N. Y. Central (F.) Ins. Co. v. National Prot. (F.) Ins. Co. 4 Kern. 85; s. c. below, 20 Barb. 468; approved, Bentley v. Columbia (F.) Ins. Co. 17 N. Y. 421; see also Utica (F.) Ins. Co. v. Toledo (F.) Ins. Co. 17 Barb. 132.

[4] Lungstrass v. German (F.) Ins. Co. 48 Mo. 201; see also Donnald v. Piedmont & Arlington L. Ins. Co. 2 Ins. Law Jour. 738, South Car.

the policy, it was held binding, as the course pursued was in accordance with his general instructions. Even if it could be shown that the relation was not material to the risk, the insurance would be void.[1] But where the agent acts for both parties the contract may be affirmed by the parties themselves. It is not void, but voidable.[2]

§ 287. **Effect of Statutes upon the Powers of Insurance Agents.**—Most of the States have, by statute, defined the conditions under which companies, incorporated by other States or nations, may do business within their borders. Such statutes, almost without exception, provide for the appointment of an agent on whom process may be served. Some of the States also provide that the agent shall be registered, give bonds, make returns, &c. An attempt has been made to establish the doctrine that, by virtue of these statutes, such agents have broader powers than ordinary agents, similarly situated, would have. Thus, in Markey v. Mutual Benefit Insurance Co.,[3] it appeared that the statutes of Massachusetts provided, that no foreign insurance company should do business till it had appointed an agent, on whom process could be served, and he had given a bond, and that no person should act as agent for such a company till the law had been complied with. Two supplemental acts defined who were to be considered agents within the meaning of these statutes; but it was held that they did not in any way change the rules of the common law regulating the power of agents, or their authority to bind their principals. Of one of these statutes the court say: "The statute applies only to the persons who assume to act as agents. It has no reference to, or bearing upon, the corporations themselves directly. It declares that such persons shall be held to be agents, 'to all intents and purposes,' that is, to all intents and purposes for which the statutes apply to agents of insurance

[1] Ritt v. Washington M. & F. Ins. Co. 41 Barb. 353.

[2] Utica Ins. Co. v. Toledo (F.) Ins. Co. 17 Barb. 132; N. Y. Cent. (F.) Ins. Co. v. Nat. Prot. (F.) Ins. 20 Barb. 468; s. c. 4 Kern. 85.

[3] 103 Mass. 78. See *Ante*, § 157.

companies. But it does not undertake to set forth their powers as agents; nor can it be supposed that it was the intention of the legislature to clothe every person who should solicit insurance in behalf of any foreign insurance company, or transmit the application of any other person for insurance, with the full powers of a general agent of such company." The Court of Appeals of Virginia, in a very recent case,[1] have, however, taken a different view of a statute almost identical; but the opinion of that court, though elaborate, is by no means satisfactory. In Mississippi, the Supreme Court say of a similar statute:[2] "But there is another view of the subject arising out of the statute regulating foreign insurance companies doing business in this State. They are required to file in the office of the Auditor of Public Accounts, a statement of their capital stock and resources, appoint an agent before they begin to do business. This agent as fully represents the corporation here as their officers do in the State of their domicile. Service of legal process upon him is of the same virtue as if upon the corporation. In effect the corporation acquires a quasi domicile here, and through its resident agent must transact its business. It is not permitted to withdraw its fund derived from premiums upon risks until losses have been adjusted. The defendant assumed the risk in dispute under the terms and responsibilities of this law, among which was the condition that it shall appoint an agent, through whom contracts of insurance shall be made, to whom premium payments may be made, and by whom obligations incurred by them shall be discharged and paid. The plain intent of the statute is to localize the contract, in its inception, and in the several stages of its performance. It may be seriously doubted whether, since this contract was made under this condition of the law, the defendants ought to be heard to insist upon a forfeiture of the policy for non-payment of the premium at their home office, when there was no

[1] Manhattan L. Ins. Co. v. Warwick, 20 Grat. 614. See this case fully stated in the chapter on the Effects of War.

[2] Statham v. N. Y. L. Ins. Co. 45 Miss. 581.

legal impediment to the continuance of an agency here. Foreign companies dealing with our citizens under this law, must be considered as engaging to accept performance from the assured here, and on their part to pay losses here."

§ 288. **Effect of Statutes.**—A question may arise under the provisions of these statutes as to the power of the company to change such agents. Many of the statutes expressly provide that the company shall, during the life of any policy issued by them in the State, keep an agent there. But what is the effect if the company disregards this obligation, and revokes the powers of all its agents? Does the agent remain such by virtue of the statute, and in spite of the revocation?[1] In Semmes v. City Fire Insurance Co.[2] it was alleged that the defendants, a foreign company, were bound by the laws of the State of Mississippi, where the property was insured and the policy issued, to keep an agent at all times during the life of the policy, but that after the outbreak of the Rebellion, in 1861, they wrongfully revoked the appointment of such agent. Shipman, J., in deciding the case, said, "If the law of Mississippi was binding on the defendants, requiring them to continue an agent in that State empowered to accept service, or upon whom service might be made during the life of the policy, and until the loss under it should be paid, then the agent in question must be deemed to have possessed that power. The defendants conferred it upon him, and he continued to represent them in that capacity till Jan. 23, 1861, as is conceded on all hands. But it is found that they revoked this power of their agent on the last-named date, so far as they could. Yet if the plaintiff's claim, that the statute

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[1] The statute of Ohio (Laws of 1872, p. 66) expressly provides that "In case any such insurance corporation shall cease to transact business in this State according to the laws thereof, the agents last designated or acting as such for such corporation, shall be deemed to continue agents for such corporation, for the purpose of serving process for commencing actions upon any policy or liability issued or contracted while such corporation transacted business in this State; and service of such process for the causes aforesaid, upon any such agent, shall be deemed a valid personal service upon such corporation."

[2] 6 Blatch, C. C. 445. This case was reversed on appeal. 13 Wall. 159. But the question here referred to was not passed upon by the Supreme Court.

of Mississippi on this subject, made part of this contract of insurance, is good, then the defendants could not revoke this part of the agent's authority. One party alone cannot change a stipulation in a contract, either express or implied, which is to inure to the benefit of another. Assuming, then, merely for the purposes of this question that the main legal proposition of the plaintiff, on this point, is correct, it follows that the power of the agent, or to speak more accurately, his character as the representative of the defendants in this matter, still remained, notwithstanding their attempt to revoke it. Service that would have bound the defendants could still have been made on him." It has been said that under such a statute the company is bound to maintain an agent in the foreign State, even during war.[1]

§ 289. **Power to Contract subject to Approval.**—It was held, in some early cases,[2] that where the agent has authority to make a contract, subject to the approval of his principal, the latter has not an arbitrary right of rejection, but is bound to approve, unless his agent has been imposed on, or the contract made by him would operate as a fraud on the rights of the company; but these decisions, even if followed now, would certainly not be extended.

§ 290. **The Power of an Agent to Bind or Estop the Company by his Acts in Framing the Application, or by Knowledge of the Matters therein Referred to.**—A very important question arises from the practice pursued by agents authorized to procure and forward applications, in themselves filling up the blanks in the printed forms of application for insurance. In such cases, the agents, not infrequently, from carelessness or misunderstanding, or because they do not deem the statement important, and, in some cases, because they fear it may induce the company to refuse to issue a policy, and thus deprive them of their commissions, do not insert all that the applicant says, or insert it incorrectly. The chief officers,

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[1] Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234; s. c. 1 Ins. Law Jour. 573.

[2] Palm v. Medina Co. Mut. F. Ins. Co. 20 Ohio, 529; Perkins v. Washington (F.) Ins. Co. 4 Cow. 645.

with no actual knowledge of this, issue a policy on the application, as it reaches them, and, after a loss occurs, defend on the ground of misrepresentation or concealment by the insured. The latter then claims to show that, in point of fact, he was guilty of no misrepresentation or concealment, as he stated everything fully and correctly to the agent, and was left to suppose that everything was written down, or was told by the latter that what was omitted was of no importance. A similar question arises, where the agent has personal knowledge of the facts concealed, or alleged to have been misrepresented, and either make out and forwards, or merely forwards, an incorrect application, making no mention of his own knowledge. The questions raised by this practice have been necessarily discussed, to some extent, in treating of Warranty and Representation,[1] but they are of so great and growing importance as to require a further consideration here.

Though there has been much difference of opinion, the decided weight of authority is now in favor of the view that, where an agent, having authority to take or procure applications, fills out the blanks, but does so incorrectly or incompletely, the company, and not the assured, must be the sufferer, either because in so doing the agent is held to be the agent of the company, and the company is presumed to do all that he does and to know all that he knows, or because the company is estopped from availing itself of the act or neglect of its agent. The courts of different States, however, differ, not only in the conclusions they arrive at upon this question, but in the grounds upon which they base their conclusions.

§ 291. **Company Estopped by Agent's Acts in Procuring the Application.**—In a leading case in New York,[2] the agent of the insurer prepared the application for a fire policy, and hav-

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[1] *Ante*, §§ 76 to 83.

[2] Plumb v. Cattaraugus Co. Mut. (F.) Ins. Co. 18 N. Y. 392. In Dewees v. Manhattan (F.) Ins. Co. 35 N. J. 366, the doctrine of this case is disapproved.

ing made the surveys and measurements contained in it, procured the signature of the applicant, without any examination on the part of the latter of their correctness, the agent representing that he had full authority to make such surveys and measurements on behalf of the insurer, and that they were correct. It was held by the Court of Appeals that, assuming the representations of the agent in respect to his authority to have been true, the insurer was estopped from showing a breach of warranty by proof of errors material to the risk in the survey and application. The court say: "If, therefore, he acted within the scope of his authority in making these surveys and measurements, and in preparing the applications, I do not see why the question is not the same in principle as if the same thing had been done by the company itself. Suppose an individual insurer had himself assumed to make the survey and measurements, and, as in this case, had filled up a blank application and had represented to the applicants that his survey and measurements were correct, and that upon the faith of such representations, and with no knowledge of the facts themselves, the insured had signed the application and thus made the statements their own. Although they had thus been led into a warranty of what was not true, they could not, undoubtedly, change the contract by parol testimony. The writing must still be held to express the contract between the parties, and neither party can insist that the contract is other than what the writing expresses. But when the party, through whose acts and representations the other party was induced to enter into the contract, claims the right to show that the facts were different from what he had represented them to be, for the purpose of showing a breach of the warranty, and thus avoiding what would otherwise be a binding contract, and escaping its obligations, I cannot discover why the doctrine of estoppel may not justly be applied to him, and he be precluded from denying what he once asserted. It presents, I think, the precise case for the application of the doctrine of estoppel *in pais* as defined in the cases."

In a subsequent case in the same court,[1] this decision is referred to as follows: "That this case has changed the rule which has hitherto prevailed in this State relating to warranties in policies of insurance will be made apparent by a brief reference to it. In that case, one Ide, in making out the application for insurance, acted as the agent and surveyor of the company. It was proved that he called upon Henry, the assured, with a printed blank application, and solicited him to effect an insurance with the defendants' company. Henry expressed a desire to postpone making the application, but told the agent, Ide, that if he insisted upon taking the application that day he must get along alone, and act on his own responsibility. Ide then proceeded to make the survey alone; after which he filled up the application, and stated to Henry that it was all right, and just as it should be. Henry, without any particular examination as to the statement of the distances between and relative situation of the buildings, told Ide that upon his representations and statements he would sign, and thereupon did sign the application, and paid the premium. This testimony was objected to, and taken under exception. On the trial of the action brought upon the policy, the insurance company under objection, proved that there were material errors in the survey, as to the relative positions and distances of surrounding buildings, and gave testimony tending to show that the risk was increased thereby. The judge at the circuit directed a verdict for the plaintiff, and, after affirmance by the general term, the judgment was appealed to this court, where it was held that the company was *estopped* from showing a breach of the warranty as to the relative situation of the buildings. This decision was put on the ground that the insurance agent, acting within the scope of his authority, bound the principal in making the survey and filling up the application, and consequently the company could not be permitted to show that the contract was other than the writing expressed. * * It must be conceded

[1] Rowley v. Empire (F.) Ins. Co. 36 N. Y. 550; s. c. 3 Keyes, 557; see as to this case Le Roy v. Market F. Ins. Co. 45 N. Y. 83, 84.

that this case goes the whole length of establishing the doctrine that, although an application for insurance contain a false statement as to material matter, the writing must still be held to express the contract between the parties, and that neither party can insist that the contract is other than what the writing expresses, provided such false statement is chargeable to the agent of the company in making the survey and filling up the application, while acting within the line of his duty."

With reference to the case then before them, the court say: "The written appointment of the agent, Dean, shows that he was the agent of the defendant, 'to take applications for insurance in the company, and receive the cash percentage to be paid thereon.' Acting under this authority the agent received the plaintiff's application for insurance. The manner of doing it was as follows: Rowley stated verbally to the agent the facts necessary to meet the requirements of the rules of the company, and, among other things, informed him the premises were incumbered by mortgage. An application was then signed in blank by the plaintiff, and given to the agent, he promising to insert over the signature thus obtained, the particulars thus furnished him as a basis of the insurance, on his return to his residence. The agent, Dean, was a witness on the trial of the case, and in giving the interview between himself and Rowley, at this time, says: 'He (Rowley) made no objection to my taking it (the application) and filling it up at Horseheads, if it would be all right.' The just and natural inference from this language is, that this unusual mode of doing the business was at the suggestion or request of the agent. But, be that as it may, for some reason unexplained, the agent, on his return, in filling up the application, inserted what was not the fact, and in violation of his instructions, that there was no incumbrance on the premises. The defendant now seeks to avoid its liability on the policy, alleging that this statement was a warranty on the part of the assured, and that it was false. * * Considering the authority of Dean in

its most limited sense, 'to take applications for insurance,' I think he must be considered the agent of the insurer rather than of the assured, in filling up the application. His duty to his principal was to take the application for insurance. It cannot be said that that duty was performed when he received the blank paper signed by Rowley, because the application was then in an inchoate state. The conditions of insurance plainly contemplate that it should be in writing, and such was the intention of the parties. When, therefore, was the duty which the agent owed to the company at an end, so that he ceased to bind his principal? It is not establishing a harsh or unreasonable rule in reference to insurance companies, to hold that their agents, authorized 'to take applications for insurance,' are acting within the scope of their authority in everything which they do which may be necessary to complete such applications. I must, therefore, regard Dean as in the act of taking the application when he was filling up the blank signed by the plaintiff, and therefore acting on behalf of the defendant. * * To hold that in performing these preliminary labors touching the very business which must necessarily be transacted before a policy can be effected, the insurance broker becomes the agent of the applicant for insurance, would seem to be an unnecessary and undesirable refinement. I repeat, that in performing these preliminary labors, the agent is engaged in taking the application, which is strictly within his duty, and the principal should be held responsible for any error he may commit, especially when the error consists in recording a false statement over the signature of a confiding applicant, which, it is claimed, vitiates the whole contract."[1]

§ 292. Substantially the same rule is adopted in Connecticut, where it is held to be the settled policy of the law[2] to treat local agents, who are authorized to procure and forward

[1] This and the prior case must be considered as overruling Smith v. Empire (F.) Ins. Co. 25 Barb. 497, and several other cases in the same State.

[2] Woodbury Savings Bank & Building Ass. v. Charter Oak F. & M. Ins. Co. 31 Conn. 517.

applications for insurance, as the agents of the companies and not of the applicants, in any mistakes in the application made by them or by the applicant under their direction, and therefore, where a mortgagee applied for insurance through such an agent, intending to procure an insurance of his mortgage interest, and so stating to the agent, but the agent drew the application as an insurance on the property itself, in the name of the mortgagor, and as his property, the amount to be payable in case of loss to the mortgagee, and so made the application, and had the policy so made in the belief that such was the proper legal mode of effecting an insurance on the mortgage interest, it was held that the mistake could be corrected by a court of chancery, although it was one of law and not of fact, and that the insured was not affected by the fact that the agent had been instructed by the company not to take applications for insurance upon mortgage interests, the insured having no knowledge of such a limitation of the powers of the agent. If such an agent neglects to communicate to the company facts disclosed to him by an applicant for insurance, material to the risk, and the company in consequence issues a policy in ignorance of such facts, the neglect of such agent is not chargeable to such applicant, unless such agent be also acting as the agent of the applicant.[1] A mistake of the company's agent in writing out the application may be shown to save a forfeiture.[2] So it is held that an agent authorized to procure applications, and furnished with printed blanks, containing interrogatories to be answered by the applicant, with regard to the condition of the property to be insured, has, as incidental to such power, authority to make all necessary explanations of the meaning and effect of the terms employed by the company in their interrogatories, and to agree with the applicant as to the terms which he shall employ to express the facts stated by him in answer to the interrogatories. The agent, in filling out the application, having also inserted a statement which the applicant had not

[1] Bebee v. Hartford Co. Mut. F. Ins. Co. 25 Conn. 51.
[2] Hough v. City F. Ins. Co. 29 Conn. 10.

made, but which the agent supposed to be true from his own observation, and which the applicant did not know was contained in the application, it was held, that the misstatement did not affect the case, having been made purely by mistake.[1]

§ 293. In Iowa a slightly different rule seems to be adopted, it being held that, where the agent has only power to receive and forward applications, and the applicant knows, or is bound to know this, and knows the requirement that a correct description is necessary, he must see that the statements and representations contained in the application are not essentially untrue. But if the agent furnishes, and undertakes to fill up applications, and is correctly informed by the applicant, but the latter is misled by his acts into supposing that he has taken down the statements correctly, then the company, having received the premium, is bound.[2]

§ 294. **Effect of Agent's Knowledge of Facts.**—The agent's knowledge of facts which show that the applicant has in the paper forwarded to the company not correctly stated the facts, is held in many cases to be the knowledge of the company, and to prevent the latter from availing itself of a defense founded on the incorrectness of the application.[3] But on the other hand it has been held that if the applicant knows that the facts are incorrectly stated in the application made out by the agent of a mutual company, he cannot hold

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[1] Malleable Iron Works v. Phœnix (F.) Ins. Co. 25 Conn. 465. To the same effect, Combs v. Hannibal Savings & (F.) Ins. Co. 43 Mo. 148; Hodgkins v. Montgomery Co. Mut. (F.) Ins. Co. 34 Barb. 213.

[2] Bartholomew v. Merchants' (F.) Ins. Co. 25 Iowa, 507. See Ayres v. Hartford F. Ins. Co. 17 Iowa, 176; Anson v. Winnesheik (F.) Ins. Co. 23 Iowa, 84; May v. Buckeye Mut. (F.) Ins. Co. 25 Wisc. 291. New Hampshire has a statute relating to fire insurance which provides that, "if any company shall issue any policy upon an application prepared by a third person, assuming to act as their agent or otherwise, they shall be affected by his knowledge of any facts relating to the property insured as if they were stated in the application."

[3] People's (F.) Ins. Co. v. Spencer, 53 Penn. 353; Howard F. Ins. Co. v. Bruner, 23 Penn. 50; Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202; Atlantic (F.) Ins. Co. v. Wright, 22 Ill. 462; N. E. F. & M. Ins. Co. v. Schettler, 38 Ill. 166; Campbell v. Merch. & Farm. M. F. Ins. Co. 37 N. H. 35; Patten v. Merch. & Farm. M. F. Ins. Co. 40 N. H. 375; Meadowcraft v. Standard (F.) Ins. Co. 61 Penn. 91. In the latter the agent had authority to contract.

the company, for he is a party to a fraud upon them.[1] It has been held that, though the knowledge of the agent is an answer to any alleged false representation, it is not so to a warranty,[2] but it is to be noted that most of the cases already cited to the contrary were cases of warranty. Where an agent, who had authority to issue policies, was correctly informed of the facts by the applicant, but said it made no difference and issued the policy, though one of its provisions was inconsistent with the facts stated to him, the company was held bound.[3]

But in order that the knowledge of the person who prepares the application should in any way bind the company or work an estoppel, such person must be undoubtedly the agent of the company. Thus in a recent case where it was clear that there had been gross misstatements as to the health of the insured, it was attempted to avoid its effect by showing that in an application made to another company the insured had called attention to the real facts, and to charge the second company with the knowledge so given to the first company, because the agent of the first company who took the application acted as medical examiner in the second case. But the court say:[4] "The medical examiner in the present case, Dr. Buehler, was not authorized by the defendants to effect insurance for them, nor did he assume to do so. The defendants had an agent of their own at Harrisburg, where Major Foot then was. Dr. Buehler was the agent then for another company in which Major Foot had obtained an insurance upon his life, and as he wished to have an insurance in different companies, Dr. Buehler simply recommended the defendant's company. He made out Major Foot's application to the defendants, and signed the certificate of a medical examination by him, but made the application for him to the defendants through their agent at Harrisburg, to whom he submitted the application, and from whom he received the

[1] Smith v. (F.) Ins. Co. 24 Penn. 320.
[2] State Mut. F. Ins. Co. v. Arthur, 30 Penn. 315.
[3] Franklin v. Atlantic F. Ins. Co. 42 Mo. 456. [4] Foot v. Ætna L. Ins. Co. 4 Daly, 285.

policy for Major Foot. Dr. Buehler testified distinctly that he did not act as the agent either of the defendants or of Major Foot. That he made the application for him at his request, to oblige him; that he was not agent for the defendants at any time, nor for any purpose. That he was paid by the defendants his fee for the medical examination, and would have been, whether the application was successful or not. That he knew, at the time of the examination for the present application, of the two attacks of spitting blood, but he says: 'I overlooked it.' As he was not an agent authorized to effect the insurance, what he may have overlooked, whether intentionally or through forgetfulness, can in no way affect the defendants. They were not bound by what he might say or omit to say. The application for the insurance was in a prescribed form. Twenty-five questions had to be answered by the applicant for the insurance, in writing, distinct from and independent of fifteen questions, which had to be answered by the medical examiner, and it was not for Dr. Buehler, but for the defendants or their agent in Harrisburg, to say when the application with the answers was laid before them, whether the risk would be taken, or not. Dr. Buehler testified that he read the questions distinctly to Major Foot, and wrote down the answers as he gave them to him. That he seemed to understand each question, and answered appropriately. That he, Buehler, read the declaration before referred to distinctly to him, and that he signed the application. The policy was issued upon the basis of the written statement, and the answers given by Major Foot to the inquiries propounded to him, and this being the case, the policy would be defeated, the answer being untrue in respect to the spitting of blood and disease of the lungs, even if Dr. Buehler had been an agent of the defendants for procuring an insurance, and knew that Major Foot had had spitting of blood, unless the doctor in addition to being an agent to procure applications was also authorized by the defendants to agree with Major Foot for a policy."

§ 295. **Strict Rule in Massachusetts.**—Attention has al-

ready been called to the fact that the law of Massachusetts, as to the powers of agents, is more favorable to the companies than that of other States.[1] It is there held that the agent, in preparing the application, is to be regarded as the agent of the applicant, whose duty it is to see that it is correctly framed. In keeping with this view, where the policy contained a warranty as to health, it was held that the knowledge which the company's agent had in respect to it could not be material.[2] Rhode Island follows, in a measure, the strict rule adopted in Massachusetts, holding[3] that an agent empowered merely to receive applications is not the agent of the company for the making of applications, and if employed by the applicant, or permitted to act for him in drawing up the application, is the agent of the applicant, who is responsible for his mistakes of fact committed in the statements or answers to interrogatories in the application. If, however, the agent, being empowered to receive and transmit written applications for insurance to the company, be requested by the applicant to copy the answers which he shall make in another application for insurance upon the same property, which was taken away by him to fill up, instead of waiting until he receive from the applicant such answers to copy, send to his company an old application for insurance upon the same property, corrected by himself to suit the change of circumstances, thus sending an application which he was not authorized by the applicant to send, the company is estopped from setting up the mistakes of fact in the application so missent by their agent in defense to a suit on the policy for a loss under it, but the company cannot be affected with notice of verbal communications made by the applicant to an agent authorized only as above; and evidence of verbal communications of facts made to the agent varying from the statements in the written application, is inadmissible to avoid

[1] Lowell v. Middlesex Mut. F. Ins. Co. 8 Cush. 127; Forbes v. Agawam Mut. (F.) Ins. Co. 9 Cush. 470; Lee v. Howard (F.) Ins. Co. 8 Gray, 583.

[2] Vose v. Eagle L. & Health Ins. Co. 6 Cush. 42. See passage quoted *ante*, § 77.

[3] Wilson v. Conway (F.) Ins. Co. 4 R. I. 141.

the effect of misstatements or mistakes in the written application.[1]

§ 296. **The Correct Rule upon Principle.**—All of these cases are, perhaps, correctly decided on the facts which they present. But, as already intimated,[2] we doubt whether the principles laid down in some of them are consistent with the old and well settled rules of law. An agent to take or procure applications may properly be held to have authority to fill up the blank forms, make the necessary inquiries, and explain the meaning of the terms used, and if nothing more than this is done, the company should be held bound by his acts. But where, after an agent has filled up a blank, he hands it to the applicant for his signature, and the latter, without being prevented by any act or assurance of the agent from acquainting himself with its contents, signs it, the principles of law applicable to the transaction seem greatly changed. The person who signs a paper knows, or

[1] In this case, Ames, C. J., referring to the positions taken in argument, says: "The first of these in substance is, that the defendants should, notwithstanding the statements of the written application to the contrary, be affected with knowledge of the facts verbally communicated to their agent. * * Had the question been one of *fraudulent* concealment or misrepresentation; had the agent been the general agent of the defendants to make contracts of insurance binding upon them, or even an agent of limited powers, but to receive and transmit *verbal* communications upon which the defendants were to insure, and the case were one of ordinary representation merely, leaving the question of materiality open, some ground for such a motion might be found in many of the cases cited by the counsel for the plaintiff. But in such a case as this, where the power of the agent is limited to the mere receiving and transmitting a written application to a distant board of directors, upon the basis of which they are to decide whether they will enter into a contract of insurance with the applicant, and upon what terms, considering his description of the risk, and where all this, too, is known to the assured before he receives his policy, it would be violating every principle of law with regard to the admissibility of parol evidence to affect a written contract, and open a door for the practice of the grossest frauds upon insurers, to admit for a moment that such a case is a proper one for the application of the rule that notice to the agent is notice to the principal. In the first place, he is no agent for such a purpose; and again, if he were, the written representation, supposed to be, and which ought to be, deliberately made, according to the common principle, waives, repels, and merges all prior mere verbal statements, and establishes itself as the basis and the only basis of the contract. Forfeiture for breach of condition subsequent stands upon a very different footing from such representations as to existing facts, made the very basis of the contract, where the agent has, by acts done with full knowledge in the course of and within the scope of his agency, waived the forfeiture."

[2] *Ante*, § 82.

is conclusively presumed to know, its contents. Unless he can show that some fraud or device was used to prevent him from acquainting himself with its contents, he should be bound by the statements beneath which he writes his signature. If there is any misrepresentation in it, he is responsible for such misrepresentation, especially if, as is usually the case, he makes an express warranty that the facts are correctly stated, without misrepresentation or concealment, and declares that the paper so signed by him is to be the basis of the contract. By signing it, he makes it his act, no matter who prepared it.[1] If, then, he has correctly stated to the agent that he has had certain diseases, or that his age is forty-five, but the agent writes down that he has not had such diseases, or that his age is thirty-five, the moment he signs such erroneous statement, it seems to us that, unless he is led to do so by some act or assurance of the agent, he should be as much bound by it as if he had never seen the agent, but had himself prepared the statement, and that the company should be at perfect liberty to defend on the ground of such misrepresentation. If he signs the application in blank, giving the agent authority to fill it up by inserting the correct statements which he has made to him, and the agent inserts incorrect ones, the condition of things is changed; for the applicant has no actual knowledge of the misrepresentation, and he could be only held, if at all, on the principle that any one who signs anything in blank, is bound by what is subsequently written over it, because he impliedly gives authority to write anything over it.[2] The applicant, when he signs the application as filled up by the agent, not only must know, but usually expressly declares, that that is the paper on the faith of which the policy is to be issued. If it states, as is ordinarily done in life insurance, that it is true, that it is full and correct, that nothing is withheld, and that it is to be the basis of the contract, it seems trifling with legal principles to say, that, though it is not true, though it is neither full nor

[1] Geib v. Internal F. Ins. Co. 1 Dillon, 443.
[2] See Liberty Hall Ass. v. Housatonic Mut. F. Ins. Co. 7 Gray, 261.

correct, and though many material facts are not stated in it, still, as the person who signed it told the truth to the agent, and made a full disclosure to him, by parol, the company shall not be permitted to avail itself of any defense founded on the falsity of the written application, which was, in fact, all that the company knew of the case when it entered into the contract. There may be, and undoubtedly is, great reason for preventing misconduct by insurance agents, but such correction should be applied by legislation rather than by such judicial declaration. As already stated, however, the tendency of the later decisions is strongly against these views.[1]

§ 297. **Company not Liable for Agent's Acts where Policy Provides Otherwise.**—The company is bound by the representations of its agents in soliciting insurance, and the assured may, on discovering fraud on his part, either cancel the contract or defend an action brought on a note given for the premium.[2] Where the application expressly provides that the insurers are not to be bound by any acts done, or statements made to, or by, the agent, unless they are contained in it, the company is not bound, though the agent fills up the application, and omits to state material matter which was known to him, if there is no fraud on his part, and if he does not prevent the applicant from stating the omitted facts.[3] The court say, in the case referred to: "The application is signed by the assured, and it is expressly stated therein, that the company shall not be bound by any act done, or statement made to, or by, any agent, or other person, which is not contained in the application. This is the

[1] Some of the companies now provide in their application that they shall not be affected by any information which does not actually reach the home office in writing before the issue of the policy.

[2] Devendorf v. Beardsley, 23 Barb. 656; Fogg v. Griffin, 2 Allen, 1.

[3] Chase v. Hamilton (F.) Ins. Co. 20 N. Y. 52; s. c. below, 22 Barb. 527. To the same effect, Loehner v. Home Mut. (F.) Ins. Co. 17 Mo. 247, 256, where the clause was in the charter as well as in the application. Masters v. Madison Co. Mut. (F.) Ins. Co. 11 Barb. 624, applies a different rule, where the provision was in the by-laws of a mutual company. See also Comm. F. Ins. Co. v. Ives, 56 Ill. 403.

express agreement of the party. Upon what principle the court is to set the provision aside, I am unable to perceive. A party signing a paper in reference to an insurance contract, is presumed to know its contents, the same as though it related to any other subject. Parties are at liberty to incorporate any provisions in their contracts that they please, provided they do not violate the rules of law. There is no reason why a party, contracting with another through an agent, may not agree that anything done by, or known to, the agent, shall not affect the contract, unless made known to the principal in writing. That is precisely this case; and, unless insurance contracts are to be made exceptions to the rule, the plaintiff is bound by the statements in the application, whether he knew them or not, unless prevented by fraud, imputable to the defendant, from learning what they were. Carelessness of parties, too prevalent in entering into contracts of this description, cannot justify a departure from the settled rules of law. The plaintiff, if he knew the contents of the application, cannot complain of being bound by its provisions. It is his contract. If he did not know, that is not the fault of the defendant. It had a right to presume that he did know, and to act upon that presumption. It probably did so act when making the proposition to insure the plaintiff's dwelling-house at two per cent. Although it may be hard upon the plaintiff thus to lose the benefit of the contract, it would be harder still to hold the defendant bound to insure a dwelling-house, composed in part of stone, and in part of wood, because it had proposed to insure a stone dwelling-house; and thus to hold, upon the ground that the defendant's agent knew the condition of the property, in the face of a positive agreement by the plaintiff, that the defendant should not be affected by such knowledge."

Referring to the case of Plumb v. Cattaraugus Insurance Co., the court say: "It will readily be seen that there is no analogy between the case now under consideration and the case last cited. In this case, there was no evidence that Atwood had any authority from the defendant to make sur-

veys; that he had ever made any, to the knowledge of the defendant, or that he made any statement to the plaintiff as to the correctness of the application. There is no feature necessary to constitute an estoppel in the case; besides, I am at a loss to discover how an estoppel is to be based upon the acts and declarations of an agent, whose acts and declarations, it is agreed, shall not affect the party against whom the estoppel is claimed."

§ 298. **Agent's Power to Waive Conditions, Before and After the Issue of the Policy.**—There is a distinction between the powers of an agent after a policy has been issued and before. He may well be held to have authority to bind the company in connection with matters transpiring before or at the time of the issue of the policy, and relating to it, but after the policy has been issued his powers, as a general thing, are, so far as that policy is concerned, exhausted,[1] unless he has the right to make a new contract. An agent without authority to contract has authority to waive payment of the premium and to deliver the policy, giving a credit for the amount, though the policy provides that no policy shall be binding till the premium is paid; and this, even though the policy also provides that the agent has no power to waive any condition in it.[2] But a subagent appointed by the agent has no such power, unless authority from the company is shown.[3] An agent's power to waive payment of the first premium is not limited by a provision in the policy, that he had no authority to waive any condition of it, where one condition was that the policy should be void if any premium was not paid when due, for the condition refers to premiums subsequent to the first.[4] The circumstances under which such a waiver takes place have

[1] Healey v. Imperial F. Ins. Co. 5 Nev. 268.

[2] Boehen v. Williamsburg City (F.) Ins. Co. 35 N. Y. 131; Sheldon v. Atlantic F. & M. Ins. Co. 26 N. Y. 460; Wood v. Poughkeepsie Mut. (F.) Ins. Co. 32 N. Y. 619; Post v. Ætna (F.) Ins. Co. 43 Barb. 351. It should be noted that most of the cases of waiver referred to in the chapter on the Consummation of the Contract were by agents.

[3] Continental L. Ins. Co. v. Willets, 24 Mich. 268.

[4] Miller v. Brooklyn L. Ins. Co. 12 Wall. 288.

been already fully shown.[1] But under the strict rules applied in Massachusetts, it was held that where the by-laws of a mutual company required the premium to be paid to the treasurer or agent, and a deposit to be made before the policy should be binding, the promise of the treasurer that, if anything should happen, he would see the premium paid or would take it upon himself to keep the policy good, did not bind the company.[2] So where an agent of the company had agreed with the applicant to call upon a third party, receive the premium and deliver the policy, but failed to do so, it was held that the company was not liable, as this agreement was a mere personal one, for the performance of which the company was not responsible.[3]

§ 299. Where a policy was made by an agent for a year, and for such further periods for which premiums should be paid and indorsed on the policy by the secretary or other authorized officer, and the policy had been several times renewed by the agent by such indorsement, and the premiums therefor forwarded to the company, it was held that the latter was bound by the agent's act, though after the last renewal they had instructed him to cancel the policy and return the premium, but though the agent notified the insured of these instructions, he did not return the premium.[4]

§ 300. An agent entrusted with the renewal receipts may give credit for the renewal premium, and may make a binding renewal by parol, though the receipts provide that they are not to be valid till countersigned by him.[5] A general agent entrusted with renewal receipts, signed by the officers of the company, has authority to deliver one of the renewal receipts on receiving part of the premium by a note.[6] The company is bound by the act of a subagent to whom it de-

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[1] *Ante*, §§ 154 to 181.

[2] Buffum v. Fayette Mut. F. Ins. Co. 8 Allen, 360.

[3] Hoyt v. Mut. Ben. L. Ins. Co. 98 Mass. 539.

[4] Franklin F. Ins. Co. v. Massey, 33 Penn. 221.

[5] Post v. Ætna (F.) Ins. Co. 43 Barb. 351.

[6] Mowry v. Home Ins. Co. 9 R. I. 347. It does not clearly appear whether the time for payment of the premium had passed when the payment was made or not.

livered a renewal certificate, where he delivered it without demanding the premium.[1] But if the renewal receipt in terms provides that if made when overdue it will not be valid in continuing the policy, unless the insured is in good health, the act of the agent in delivering it is without effect.[2] So an agent may, by delivery without countersigning, waive a provision that the policy was not to be valid until countersigned by him.[3] But where the policy provided in the usual form that premiums should be paid "on or before the day mentioned for the payment thereof at the office of the company in the city of New York, unless otherwise expressly agreed upon in writing, or to agents when they produce receipts signed by the president or secretary," it was held[4] that the premiums were to be paid on the days fixed by the policy, in any event; and the assured might pay on those days, either at the office of the company in New York, or to agents; but the payment could only be made to such agents as should have and produce receipts therefor, signed by the president or secretary—the receipts thus signed being evidence of the authority of the agents to receive the premiums. An agent with authority to settle a loss may waive a condition as to time for bringing suit.[5] One with authority to receive premiums may use his discretion as to the mode of payment, whether in cash or by check.[6] He could, while the notes of the Confederate States had a value and the Government retained a *de facto* existence, take notes of that Government.[7]

§ 301. Where by the contract between the company and its agent, he was authorized to deliver receipts and receive premiums upon policies at any time within fifteen days after they became due, but was at the expiration of that time to

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[1] Bodine v. Exchange F. Ins. Co. 51 N. Y. 117.

[2] Bissell v. Am. Tont. L. Ins. Co. 2 Bigelow Life & Acc. Ins. Cas. 150, Ohio Common Pleas.

[3] Meyers v. Keystone Mut. L. Ins. Co. 27 Penn. 268.

[4] Williams v. Washington L. Ins. Co. 31 Iowa, 541; s. c. 1 Ins. Law Jour. 422.

[5] Lycoming Co. Mut. (L.) Ins. Co. 44 Penn. 259.

[6] Tayloe v. Merch. F. Ins. Co. 9 How. (U. S.) 390.

[7] Robinson v. Internat. L. Ins. Co. 42 N. Y. 54.

give notice of any unpaid premiums, and, if he failed to do so, was to be held responsible for the premiums, and the agent received a premium twenty-eight days after it had become due, upon a policy as to which he had failed to give notice of non-payment to the company, it was held that the latter was not bound, that the agent had no authority to receive premiums after the fifteen days had expired, nor to make a new contract, and that the assured could not derive any advantage from the fact that the company had charged the agent with the premium, for that was a private arrangement between them in the nature of a penalty.[1] An agent with power to effect insurance has full power to waive conditions,[2] and to correct an error in the policy after its issue.[3] But one who is an agent merely to receive applications, has no such power after the issue of the policy.[4] It has been held in Missouri,[5] that the secretary as such has no power to waive a condition in an issued policy, but this may be doubted.

§ 302. **Agent's Power to Receive Notice.**—An agent with power to effect insurance, has authority to receive notice of other insurance.[6] But an agent to receive applications has no authority to receive such notice with reference to a policy theretofore issued.[7] The company is bound by a notice given to him at or before the issue or renewal of the policy.[8] Thus where a fire policy required notice to be given of any other insurance subsequently obtained, and notice was given to an agent, the question arose as stated by Comstock, J.,[9] "whether Park, the agent who assumed to

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[1] Acey v. Fernie, 7 M. & W. 151.

[2] Viele v. Germania (F.) Ins. Co. 26 Iowa, 9; North Berwick Co. v. N. E. F. & M. Ins. Co. 52 Me. 336; Warner v. Peoria M. & F. Ins. Co. 14 Wisc. 318.

[3] Warner v. Peoria M. & F. Ins. Co. 14 Wisc. 318.

[4] Bartholomew v. Merch. (F.) Ins. Co. 25 Iowa, 507.

[5] Plahto v. Mer. & Man. (F.) Ins. Co. 38 Mo. 248.

[6] Carroll v. Charter Oak (F.) Ins. Co. 40 Barb. 292; McEwen v. Montgomery Co. Mut. (F.) Ins. Co. 5 Hill, 101.

[7] Mitchell v. Lycoming Mut. (F.) Ins. Co. 51 Penn. 402; *contra*, Hayward v. Nat. (F.) Ins. Co. 2 Ins. Law Jour. 503, Mo.

[8] People's (F.) Ins. Co. v. Spencer, 53 Penn. 353.

[9] Wilson v. Genesee Mut. (F.) Ins. Co. 4 Kern. 418.

approve of the second insurance, acted by authority derived from the defendants. The appointment of Mr. Park as agent was in writing, and under the corporate seal of the defendants, and by its terms it declared that he 'had been regularly appointed an agent and surveyor of the company, and was duly authorized to take applications for insurance.' This was the only express authority which the agent ever received from the company, and there is no evidence in the case from which any other can be implied. It does not appear that he was ever held out to the world by his principals as possessing any power not included in his written appointment, or that he ever performed any acts as agent, until the one now in question, which that appointment would not in terms justify. The defendants, therefore, are not bound by his approval of the subsequent insurance, unless that act is included within the written power. * * The design was to constitute an agency with the powers specified, and no others. If this be not so, then, I repeat, the writing suggests no limitation whatever. The agency is either general, and extends to all the business of the corporation, or it is limited to surveys and receiving applications. There is no middle ground, and between these two constructions there is no room for hesitation. * * I have no doubt that notice to Mr. Park, at the time of receiving the application, of the prior insurance, would be good. He was authorized to negotiate contracts of insurance, and therefore any facts which the company required to be made known before entering into the contract, might properly be communicated to the agent. A prior insurance is a fact which enters into the negotiation, and then into the contract. The fact may therefore be notified to the agent who negotiates, and it is his duty to communicate it to his principals before the contract is concluded. But I cannot see that it is any part of the duty of such an agent to deal with the assured, in any respect, after the policy is issued. The agent's functions have then ceased in respect to that contract, and he has no power to save it from forfeiture by his approval of a subsequent insurance."

§ 303. Where a policy requires notice of loss, a director is not an "authorized officer" to whom notice can be given out of the office.[1] The rule would probably be otherwise in England, where the directors, as such, participate more actively and generally in the business of their companies than in this country. Where an agent assigns his own policy, notice to him is not sufficient,[2] nor is notice to an agent who is expressly forbidden to receive notice.[3]

§ 304. **Agent's Power to give Consent.**—An agent to receive applications has no power to give a consent to an assignment of the policy after it has been issued. In a case in New York where the question was as to the validity of certain assignments, the court say,[4] "It is now contended, however, that Brewster, as agent of the defendants, had authority to grant the assent of the company to these assignments. It is very apparent from the testimony and the correspondence between Brewster and the company what his powers were. 1. He had authority to receive applications for insurance, and make them binding upon the company for the period of ten days. At the expiration of that time, if the company did not assume the risk, it terminated. 2. He had power to receive the premiums on renewals of policies and transmit the same to the company, and, if accepted by them, on the receipt by him of the renewal certificates, signed by the officers of the company, to deliver the same to the assured. * * As already observed, the policy carried on its face, notice to all holders that the interest of the assured was not assignable unless by consent of the corporation, manifested in writing, and the printed blanks on the back of the policy were like notice of the form of such consent, and the officer alone authorized to give it and manifest the assent of the company. It was full notice to all that it must be done by its secretary, and the erasure by Brewster of the word 'secretary' and writing in place thereof the word 'agent' was an admonition to the

[1] Inland (F.) Ins. & Dep. Co. v. Stauffer, 33 Penn. 397.
[2] *Ex parte* Hennessey, 1 Connor & Lawson, 559.
[3] *Ex parte* Hennessey, *ubi supra;* Gale v. Lewis, 9 Q. B. 730.
[4] Stringham v. St. Nicholas (F.) Ins. Co. 3 Keyes, 280; s. c. 37 How. 365; 5 Abb. N. S. 80.

parties that the authority to give the consent was in the secretary only. It is doubtless true that the person applying to Brewster for these consents, may have supposed he had authority to grant them, or if not, that his acts would be ratified by the defendants. But Brewster could not create an authority in himself to do the particular act, by its performance, or asserting his authority to do it. To bind his principal, his character as agent must be established, and of so general a nature as to give him authority to do the act in question, or subsequent ratification with full knowledge must be established. The proof in this case falls far short of making out either of these positions. * * The declarations and acts of Brewster, not within the scope of his agency, if therefore they had been admitted, would not be of any materiality. The declarations and representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency. * So in the case at bar, there is no evidence that these defendants ever authorized Brewster to give the consents to the two assignments mentioned, or that they ever knew that he had given such consents, until after the happening of the loss under the policy. We have seen what were the actual powers conferred by the defendants upon Brewster, and what was the scope of his agency. Not only was the power to give the consents in question not within the scope of that agency, but the policy itself, and the blank consents indorsed thereon, gave notice to all holders of such policies, that an agent of the company had no such powers." But, where it was shown that the agent had been in the habit of indorsing waivers of conditions on policies and notifying the insurers thereof, it was held this was sufficient proof of his authority so to do.[1]

§ 305. **An Agent's Power to Renew or Restore a Lapsed Policy, and to Waive Forfeitures.**—An agent who has authority to make contracts, or who is entrusted with blank policies, signed by the officers of the company, has undoubted power

[1] Brockelbank v. Sugrue, 5 C. & P. 21.

to renew a policy.[1] So he may waive a forfeiture.[2] An agent who is entrusted with renewal receipts may bind the company by using one of them in renewing an expired policy.[3] But an agent whose powers do not extend to making a new contract cannot, as a general thing, waive a forfeiture.[4] This point is carefully considered in a Connecticut case,[5] which also involved a consideration of the presumed powers of an agent. The court say: "The next question is, whether it was proved on the trial that Webb was authorized by the defendants, as their agent, thus to waive the non-payment in advance of the premium as required by the terms of the policy. The first premium due on it was paid in advance to Webb up to Jan. 1, 1852, according to its terms, and it was, at the time of such payment, by him countersigned and delivered to the insured. The question before us respects the next premium payable in advance on that day, in regard to which, it was, as claimed by the plaintiff, paid by the insured to Webb, and received by him for the purpose of reviving and continuing the policy, but confessedly after that day, and without any other authority in Webb excepting that which is contained in the policy itself. We are therefore to look to that instrument alone for the evidence of his authority to receive that premium. And the only expression in it, from which that authority is claimed to appear, is the testimonium clause at the end, which provides that the policy 'shall not be binding until countersigned by W. W. Webb, agent, and delivered, and the advance premium paid.' The question before us, therefore, depends on the true construction of that clause, or rather of the word 'agent' contained in it. * * From this it is clear that the policy was not intended to take effect by a delivery to the insured by the defendants immediately on

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[1] Carroll v. Charter Oak (F.) Ins. Co. 40 Barb. 292; Post v. Ætna (F.) Ins. Co. 43 Barb. 351.

[2] Viele v. Germania (F.) Ins. Co. 26 Iowa, 9; North Berwick Co. v. N. E. F. & M. Ins. Co. 52 Me. 336.

[3] Post v. Ætna (F.) Ins. Co. 43 Barb. 351.

[4] Wall v. Home (F.) Ins. Co. 8 Bosw. 597.

[5] Bouton v. Am. Mut. L. Ins. Co. 25 Conn. 542.

its execution by the latter, or by any other delivery than one which would be made through an agent; that it was intended that the delivery of it by such agent was not to make the contract binding until it should be countersigned by him, and the premium mentioned in it should be paid in advance; that is, before the commencement of the period for which the insurance under it should be effected; and that Webb was the particular and only person or agent to whom the premium should be paid, and by whom the policy should be countersigned and delivered on behalf of the defendants. The direct and immediate object of this clause was to prescribe the mode in which the policy should take effect as a contract between the parties. That mode is particularly described, and required the interposition of an agent, and Webb was designated as that agent. The clause states exactly what is to be done by him, or in other words, the authority which the defendants have conferred on him. The word 'agent' added to his name, considered as we are now doing, with reference only to the said clause, imports no more than that he was the agent of the defendants to do and co-operate in the things which it was therein provided should be done for the purpose therein mentioned, of making the contract binding. One of those things was the payment by the insured of the premium in advance to and consequently its reception by him. This being done, together with the countersigning and delivery of the policy, the contract became, but could not otherwise become, consummated and complete. The question now is as to the extent of the authority which was thus conferred on Webb in regard to the premiums provided for in the contract. We think that he was not empowered to receive any premium which was not paid according to the requirements of the policy, that is, in advance. That instrument was his sole guide in regard to what he should do under it. The contract was to be made by the defendants, and not by him, excepting in the capacity of their agent; he was not authorized to alter or vary it, or depart in any respect from it, or dispense with the fulfilment of its conditions by the in-

sured, or discharge it, or revive it after it had by its terms ceased to be obligatory on his principal, by a waiver of a compliance with its provisions or otherwise. These must be done by the parties to the contract. He was only authorized to act in pursuance of it, and then so far only as it gave him authority. He could exercise only the power delegated to him, and no power is delegated to him to depart from the terms of the policy. * * If it be admitted that by the clause in question, Webb was authorized to receive not only the first premium which was required to be paid on the policy, but also those which it provided might subsequently be paid upon it, which has not been denied by the defendants, the question before us may be tested by inquiring whether, in respect to the first premium, the policy gave Webb any authority to bind the defendants by a delivery of the policy before the payment of such premium; for as he had no greater power in regard to subsequent premiums than he had as to the first, it is quite clear that if he was not authorized to postpone the payment of the first, he was not as to those accruing afterward. To this inquiry the policy furnishes a most explicit and decisive negative answer. It expressly says that the policy shall not be binding 'until the advance premium is paid.' The whole authority of the agent being here expressed on the face of the instrument, there is no place for the doctrine which is applicable to cases where an agent with an ostensible general authority is restricted by particular and special private instructions from his principal, and which has been adverted to by the plaintiff's counsel. We are therefore of the opinion that although Webb might be, and we are strongly inclined to think that he was, authorized by virtue of his agency, as indicated in the policy, to receive in advance the payment of premiums which should by its terms be payable subsequent to its execution and delivery, he was not thereby authorized to receive such premiums after the day on which it was provided by the policy that they should be so paid in advance."[1]

[1] It will be perceived that the views here expressed as to the power of the agent to waive payment of the premium and deliver the policy, differ from those generally entertained.

§ 306. The same question was presented in a New Jersey case, where, however, there was an express clause in the policy on the subject.[1] The court say: "The result of the non-payment of that premium was to forfeit the policy, unless the plaintiff showed that the company had legally waived the payment as it became due. It was not claimed that the company had dispensed with the payment at the time by any written agreement or consent, but the tendency of the plaintiff's evidence was to show that Charles Knopf, who, it was said, was the general agent of the defendants, had orally consented, about the time the third payment became due, which was December 8th, 1864, that the plaintiff could pay it afterwards when he had it, and that from that time he had seen Mr. Knopf, and told him he could not pay to the day, and Mr. Knopf had said, 'Don't be scared if the money is not ready by the day; when you send it down I will get you the receipt,' and that the other payments after that were sometimes a week, sometimes two weeks afterwards, and that the receipts were brought back. This is the chief part of the plaintiff's case upon the fact or act of waiver. It will be seen at once that it is an effort to show a verbal waiver of performance by an agent of the company in opposition to the terms of the written policy, and that under seal. It is not proposed now to discuss the effect of such verbal waiver when distinctly proved, and when made within the scope of an agent's authority. If Knopf, the agent of this company, had no authority, in point of fact, express or implied, to make such waiver, that disposes of this case. In the policy there is a clause that the same shall not be valid until the actual payment of the premium has been made in cash, and receipted for at the bottom of the policy, by Charles Knopf, agent for Newark, N. J. The policy also refers to certain conditions and regulations printed on the back thereof. * * These conditions, by force of that stipulation, became and are a part of the contract of insurance or policy. The first, third, and fifth of such conditions are as follows: '1. Policies ex-

[1] Catoir v. Am. L. Ins. & Trust Co. 33 N. J. 487.

pire at noon on the last day of the period for which payment has been made. 3. Agents are not authorized to make contracts for the company, nor to write upon the policy, except his signature, when necessary to the first receipt of premium (see condition No. 5), nor to waive forfeiture of the same. 5. The receipts for the premiums, excepting the first (to be found on the face of this policy), will invariably be given on a separate paper, and will not be valid without the seal of the company.' The receipt for the first premium is indorsed upon the policy, and signed by Knopf, as agent, in accordance with these conditions. This, then, is the character of policy on which the plaintiff bases his suit. It contains an express limitation upon the power of agents. Knopf is termed such in the policy and receipt, and his authority was subject to those conditions. Whatever may have been his precise relation to the company, as a medium through whom the insurance was effected, at the time the same was effected, and whatever may be the full scope of the declared inability of the agent to make contracts for the company, it is clear that after the policy was obtained by the plaintiff, the agent had then no power to contract with him as against the defendants, to change the terms of the policy, or to dispense with the performance of any part of the consideration, even by writing, much less by word of mouth. That part of the condition against making contracts is not the only clause of limitation on the act of the agent sought to be enforced against the company in this case. The words, 'nor to waive forfeiture of the same,' equally limit his power. To waive a forfeiture, it is not necessary that the forfeiture shall first have occurred. If the premium is not paid when due, the policy is void. The forfeiture results from the non-payment. If additional credit is legally given on the premium, that is, *ipso facto*, a waiver of the forfeiture. It is a waiver of the operation of the clause of the forfeiture in the policy. If the agent undertakes to give credit on the premium, he undertakes to waive forfeiture, and that this agent was restricted from doing when this policy was received

by the plaintiff. At that time the company sought to protect itself from unauthorized acts of its agents, by virtually declaring in what respect their powers were limited, and giving the plaintiff full notice thereof in the policy. He is estopped, by accepting the policy, from setting up in this case powers in the agent at that time in opposition to the limitation of the conditions. * * There is no evidence even from which it could legally be presumed that the company had any knowledge of the short delay in the payment of some of the preceding premiums by the plaintiff, and if any presumption of such knowledge could exist, the effect is entirely destroyed by the words in the margin of the receipt of June 8, 1865, the last receipt of premium, that it is understood and agreed that unless the next premium shall be paid on or before the day it becomes due, at twelve o'clock (noon), the policy will be forfeited and void. That Knopf countersigned the receipt of June 8, 1865, by stamping it with his name, as general agent, amounts to nothing against the company, if for no other reason, because he, Knopf, is styled in the receipt as agent, and the attesting clause is 'witness the seal of the said company, and the signature of the secretary, countersigned by Charles Knopf, agent.' There is no evidence of any knowledge on the part of the company, that Knopf had styled himself general agent. He certainly did it against the requirement of the receipt in its attestation, and the plaintiff had no right to deduce any new authority from that. In the face of a distinct written expression of a want of power in the policy, the plaintiff has no right to infer a power to the contrary against the company by any uncertain signs. The limitations are presumed to continue. * * This want of authority in the agent to relieve from the payment of the premium when due, either by writing or verbally, is a fatal defect in the plaintiff's claim."[1]

An agent for issuing policies and receiving premium notes cannot waive a stipulation in a policy issued by him, declaring that in case the note given for premium should not

[1] See, also, North v. N. A. L. Ins. Co. 5 Coast Rev. 93, U. S. C. C. Cal.

be paid at maturity, the policy shall be void, especially after a forfeiture of the policy has attached by the non-payment of the note.[1]

§ 307. **Clerk's Power to Waive Forfeitures.**—The case of Koelges v. Guardian Life Insurance Co. presented the question of the power of an agent, a clerk, to waive a forfeiture by receiving a premium on a policy after the day it was due. It was involved with the question as to how far the company had held the clerk out as possessing such power and had recognized the exercise of a similar power. The case has been three times tried. On the first trial a verdict was directed for the plaintiff, but it was set aside on appeal,[2] the court saying: "At the time of the payment by plaintiff to Holley of the two quarterly premiums, the policy was forfeited by its terms. It then became incumbent upon the plaintiff, in order to recover upon the policy, to show a receipt of the premium, by some one authorized to receive it after the forfeiture, or to show a ratification of an unauthorized receipt by the company, by an acceptance of the money with knowledge of the facts, or in some other way. I think the case fails to show Holley's authority to receive the money after forfeiture. He was a clerk of defendants; had been an agent to receive applications for insurance in New Jersey, which appointment had been revoked. He had been sent by a previous secretary to collect premiums, but always with strict orders to collect none on forfeited policies. Holley signed the receipts for the payments in question as agent for the then secretary. There is no proof of his power to act as agent for the secretary. Neither Holley nor the secretary is produced as a witness. If the secretary had power to waive the forfeiture, he is not proved to have done it. Holley had never done a like act; his power to bind the company by receiving money on policies in life would be no evidence of power to waive the forfeiture by receiving the premiums, after the policy had ceased to exist by reason of non-pay-

[1] Wall v. Home (F.) Ins. Co. 8 Bosw. 597.

[2] 2 Lans. 480; s. c. 9 Abb. N. S. 91; 58 Barb. 185.

ment. The company have never received the premiums collected by Holley. I am unable to distinguish this case in principle from an unreported case in this district.[1] In that case, the policy was upon the life of one E. P. Taylor. William Wilson was the agent to receive the premiums; he was instructed, if the premiums were not paid in thirty days, to return the receipt to the general agent in New York. The policy provided that it should be void if the premiums were not paid within thirty days after the same became due. Taylor suffered default for over thirty days. About fifteen days after the policy became forfeited, the assured paid the premium to a clerk in the office of the agent, Wilson; within a few days after this payment the assured died. The company never received the money. The clerk in the office of the agent had generally received the premiums for his father, the agent. The court held that William Wilson had no power to waive the forfeiture, or to bind the company by receiving the money after default. That he was a special agent, and could not exceed his powers as such, and bind his principal by his acts, although the assured knew nothing of his limited powers."

On another appeal it appeared that the plaintiff's evidence on a subsequent trial showed that the clerk to whom the premium was paid was commonly sent to collect premiums, and was accustomed to sign receipts therefor, and it was therefore held that the question of his authority to waive a forfeiture should have been left to the jury. The court say,[2] the opinion being delivered by the same judge as on the former trial, that the plaintiff "paid her money due for the back premiums to a person (Holley), who was in the employ of the defendant, and whom she found at a desk behind the railing or counter at their place of business. She paid, after inquiry as to the past payments, and after Holley had examined the defendant's books and given her the information which she sought. She asked if she could pay the

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[1] Taylor v. Brit. Com. L. Ins. Co.

[2] 10 Abb. N. S. 176.

back premiums, and was answered by the said person, 'Certainly you can.' The secretary was an officer of the company, and as such had the power to receive overdue premiums, and waive forfeitures. The by-laws of the company admitted on this trial, and excluded on the first, established this power of the secretary. Castle, the cashier, received premiums on expired policies, and had direct authority to sign for the secretary, and by the evidence of the then secretary of the defendants it appears that various persons in the cashier's absence, Holley among the number, occupied the cashier's desk and acted for him. The secretary also testifies that when he found policies behindhand, Holley was sent to collect them. 'What he would take I cannot say.[1] I did not sign one in a thousand of the receipts; he might sign them, or somebody else might sign them; many of the clerks used to sign for me, without any authority that I know of.' The same witness testifies, 'that the only way of waiving a forfeiture was by receiving the premium and giving a receipt,' and also that the general practice of the company was to waive forfeiture by receiving the premiums when there was nothing in the case to raise suspicion or inquiry. * * * Whatever the terms of the policy, whatever the rules and regulations of the company, made in its interest and for its protection, the defendants had power to waive them, not only by express formal waiver, but also by its ordinary custom and mode of dealing with its patrons. No corporation should be permitted to annul the effect of the customary method of its dealings and business by invoking the force of laws and regulations which it has practically disregarded; and if, in this case it has compromised the effect of its rules by their frequent and habitual suspension, and if it has allowed those to act or to seem to act, as officers, who were not officers, its formal regulation against such a course of dealing can avail nothing. Its liability, so far as this action is concerned, is to be determined by its own conduct. If

[1] This statement was in answer to the question whether Holley took with him receipts, and by whom such receipts were signed.

Holley, under all the proof, has been permitted by the company to occupy a position and discharge duties which authorize the insured to treat with him as with an officer empowered to remit forfeiture and renew policies, then the plaintiff should recover. How the jury should have found it is not for me to say, but it should have been submitted to them upon the whole case, to determine whether the defendants, by the conduct of their business and the character of the different duties performed by Holley, had or had not authorized the plaintiff to rely upon the transaction with Holley in the matter of the overdue premium, as a transaction with the company itself."

§ 308. **Waiver by Receipt of Premium from Agent.**—Where an agent, having authority to receive premiums, receives them after there has been a breach of condition and consequent forfeiture, and forwards the premiums to the insurers, who retain them in ignorance of the forfeiture, the company are as much bound as if their agent had informed them of the breach of condition before they took the premium.[1] Although an agent has no authority to bind them by receiving payment of a premium note after it is due, the company may receive such payment at any time, and if they receive the amount of the note from their agent after it is due, they are bound to inform themselves of the time when it was paid to him, and, by receiving it from him without inquiry, they waive the right to insist upon the delay in payment as a ground of forfeiture.[2]

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[1] Wing v. Harvey, 5 De G. M. & G. 265; s. c. 27 Eng. Law & Eq. 140; Supple v. Cann, 9 Ir. Law, N. S. 1265; s. c. 4 Ir. Jur. N. S. 72.

[2] Hodsdon v. Guardian L. Ins. Co. 97 Mass. 144. In Wing v. Harvey, Bruce, L. J., says, "If the directors, represented by the defendant, had themselves personally received the premiums which Mr. Lockwood received, with the same knowledge that he had, there certainly would have been a waiver of the forfeiture, and the defense in this case would have been ineffectual. But he was their agent, for the purpose of receiving premiums at least on subsisting policies. The premiums in question were paid to him upon the faith of the policies continuing valid and effectual, notwithstanding Mr. Bennett's departure for Canada and residence there—a faith in which Mr. Lockw[illegible] acquiesced—and to which he expressly acceded. The premiums thus [illegible] transmitted by Mr. Lockwood to the directors from time to time, and [illegible]

§ 309. Where a company in the exercise of a power reserved in the policy instruct their agent to cancel a policy, but he, instead of doing so absolutely, agrees with the insured that it shall remain in force until other insurance is procured, the company remains liable.[1] So if the agent, though notifying the insured of the directions to cancel, fails to pay or tender the premium, the policy remains in force.[2]

§ 310. **Agent's Power to Delegate Authority.**—Where the appointment of subagents is the ordinary custom in the particular business for which the agent is appointed, he may delegate his authority to such a subagent, the rule being that the authority is exclusively personal, unless, from the express language used or from the usage of the business, it appears that a broader power was intended to be conferred.[3] In life insurance, it is believed, that the local agents have no such power to appoint subagents, while general agents who are placed in charge of a particular State or district may have such power. An agent to issue policies, which were not to be valid till countersigned by him, cannot delegate the power to countersign.[4] But though he cannot delegate his general authority, he is entitled to perform and must necessarily perform a great number of his acts and functions through the aid of persons to whom he delegates his authority; and it was therefore held that where an agent authorized to grant temporary insurances, procured applications through subagents, which he subsequently acted upon and forwarded to the company, the latter was bound.[5] So it has been recently

without objection, I think, whether Mr. Lockwood informed, or did not inform them in fact of the true state of circumstances in which the premiums were paid to him, the directors became, and that they are, as between themselves and the plaintiff, as much bound as if he had paid the premiums directly to themselves, they knowing at the time, on each occasion, the place of Mr. Bennett's residence. The directors, taking the money, were and are precluded from saying they received it otherwise than for the purpose and in the faith for which and in which Mr. Wing expressly paid it."

[1] Goit v. Nat. Prot. (F.) Ins. Co. 25 Barb. 189; Ætna (F.) Ins. Co. v. Maguire, 51 Ill. 342.

[2] Franklin F. Ins. Co. v. Massey, 33 Penn. 221; McLean v. Republic (F.) Ins. Co. 3 Lans. 421.

[3] Story on Agency, § 14.

[4] Lynn v. Burgoyne, 13 B. Mon. 400.

[5] Rossiter v. Trafalgar L. Ass. Assoc. 27 Beav. 377.

held in New York that an agent can authorize his clerk to contract for risks, to deliver policies, and to give credit for premiums, or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case.[1] The agent of an accident insurance company who has absolute power to insure against accidents may appoint subagents, as the agency is not one requiring skill or discretion, tickets being sold to all who apply for them.[2] In this case the court say: "These tickets insuring against accidents are made out and signed at the company's principal office, and transmitted to their various agencies, to be sold indifferently to all who apply for them. The agent does nothing more than deliver them to the applicant and receive pay for them. The person buying them takes them subject to the printed conditions, and if he violates the conditions he incurs the hazard of losing all the benefit. As well might it be said that if certain articles of merchandise were deposited with a merchant for sale, the merchant's clerks would be incompetent to sell. It would indeed be monstrous to allow these insurance companies to go on and sell tickets and receive all the profits accruing therefrom, and then, when an accident occurred, to shield themselves from liability upon such a pretext."

§ 311. In Bowman v. the United States Casualty Insurance Co.,[3] a question of the authority of an agent was involved. It appeared that the company issued blank policies, signed by its president and secretary, which contained a clause, that they "shall not be valid until the premium is actually paid, and the policy is countersigned by a duly authorized agent of this company." One Furlong, claiming to be such duly authorized agent, received an application from the husband of the plaintiff, and issued to him the policy

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[1] Bodine v. Exchange F. Ins. Co. 51 N. Y. 117.

[2] Brown v. Railway Pass. Ass. Co. 45 Mo. 221.

[3] Not reported. Decided at Erie County General Term, in Feb. 1869, and affirmed by Ct. of App. March, 1871.

upon which the action was brought. The question chiefly litigated was, whether Furlong was, in fact, the agent of the company, so that he had authority to countersign the policy. The Supreme Court at General Term, say: "It was undisputably proved on the trial, that after C. F. Langford opened his office in Buffalo, he empowered Furlong to act as agent for the company, in soliciting business, making any contracts of insurance, receiving premiums, filling up and countersigning policies; treating and regarding him as fully and completely qualified to do the act now the subject of this controversy, and bind the defendant thereby. It is also as unquestionably proved, that this employment of Furlong, as agent, by C. F. Langford, was never by him, in fact, in any mode or manner, communicated to the company, or to the home office in New York city, of Wm. Langford & Sons, of which firm he was a member. To sustain the proposition, or rather the question of fact, that Furlong was duly appointed the agent of the defendant, it must be proved to emanate from Wm. Langford & Sons, the general agents of the company. * * I am of the opinion, that Chas. F. Langford, acting under the power of attorney, issued to him [by the company] under the date of Nov. 16, 1866, possessed only limited special power, 'to receive moneys, and to countersign and issue general accident policies of insurance, and renewals of the same;' and that he was unauthorized to appoint subagents, vesting them with the right to make contracts of insurance, and countersign policies. Under this instrument, the duties he was charged with required the use of his best judgment and most cautious action, which he could not transfer to another. * * It appears from the evidence, that Wm. Langford & Sons, of which firm Charles F. Langford was one, are the general agents of the company for the State of New York, and included in their powers was the authority to appoint agents to solicit business, countersign and issue policies. How and when they were appointed such general agents, the papers do not state, but it appears that they acted as such from October, 1866, until after Bowman's death. They had an of-

fice in the same building and room with the president in the city of New York, gave themselves out to the public as general agents, corresponded with local agents of the company, directing them in business affairs. In the power of attorney to Charles F. Langford, dated Nov. 16, 1866, they are declared to be general agents. When Campbell, the former agent of the company at Buffalo, applied to the president to be appointed agent, he was referred by the president to Langford & Sons, the general agents of the company for this State. This evidence is not disputed, nor are any circumstances proved that tend to weaken it, and it is but a fair and just implication that William Langford & Sons were duly commissioned as general agents, in this State, for this foreign corporation. It is claimed by the defendant, that the power of attorney, given to Wm. Langford & Sons, limits them to the right, 'to receive moneys, and to countersign and issue policies.' On the 13th of April, 1866, two months after the corporation was created, this commission was issued to them, and is in the nature of private instructions, which do not affect those who are ignorant of them, and deal with the agent as having the general power which he assumed, with the implied assent and knowledge of the corporation. Charles F. Langford remained one of the firm of Wm. Langford & Sons, though he had an office in Buffalo, and I cannot see that taking the special commission from the defendant, which he did on the 16th of November, had the effect to abridge his power as general agent. His acts show that he did not so regard it. In the receipt which he took from Furlong for blank policies, he describes himself as general agent. Then, if I am right in the conclusion to which I have arrived, that it was within the power of Wm. Langford & Sons to appoint local agents, with power to countersign the policies, Furlong had an appointment, duly made, to act as agent for the company. This being a general agency, to do and transact the business of the corporation, in its various departments, and partaking of the nature of mercantile business, one of the firm of Wm. Langford & Sons could act

and bind the company, and it was not necessary to have the assent of all the members of the firm to the appointment."

§ 312. **Termination of Agent's Authority.**—If an agent's authority to act is revoked, he cannot thereafter bind the company, but, if he assumes to continue the exercise of the powers which he has previously had, he would bind the company in dealing with one who knew of his prior agency, and had no knowledge of its termination. If two persons are jointly appointed *agent*, one cannot act alone, and if one dies, the power is revoked.[1] So if two persons are appointed agents, not as individuals but as partners, the principal has a right to suppose that the joint action of both will be invoked, and therefore the agency ceases on the death of one, so that the survivor cannot exercise it either in his own name or in that of the firm, and payments made to the survivor by one who had notice of the death do not bind the company.[2]

§ 313. **Personal Liability of Agents.**—The directors are considered to accept their office as trustees for the benefit of the shareholders and with corresponding duties and liabilities. If either directly or through agents, they put forth false or fraudulent statements, they are personally liable to those who are thereby deceived.[3] Each is, however, liable only for his own acts, though by acquiesence in what was originally an unauthorized use of his name, one may become bound.[4] The declaration of a fictitious bonus is a fraudulent statement.[5] If the directors of a company agree to publish false statements of the affairs of the company, for the purpose of fictitiously enhancing the price of shares for their own benefit, they are liable to a person who is thereby induced to purchase

[1] Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

[2] Martine v. Internat. L. Ins. Soc. 62 Barb. 181; s. c. 5 Lans. 535; affirmed in Ct. of Appeals, 9 Alb. Law Jour. 94.

[3] Watson v. Earl Charlement, 12 Q. B. 856; Reg. v. Welman, 17 Jur. 421; Gerhard v. Bates, 2 E. & B. 476; Denton v. Gt. N. R. Co. 5 E. & B. 860; Williams v. Swansea Harbor Trustees, 14 C. B. N. S. 845.

[4] *Ex parte* Johnson, 3 Eq. R. 479; Beeching v. Lloyd, 3 Eq. R. 737.

[5] Burnes v. Pennell, 2 H. of Ld.'s Cas. 497.

shares. So if they declare fictitious or unearned dividends.[1] There can be little doubt that an agent may render himself personally liable by false statements made to an applicant for insurance. If he binds the company by his statement, it may be that he will escape personal liability, but if he is held not to have that authority, then he undoubtedly becomes personally liable himself. Where a company proves to have been insolvent at the time the policy was taken, and the agent has represented it as solvent and responsible, this personal liability may become important.

§ 314. **Power of Principal over Agents, and Rights of Agents.** —Differences between agents of the insurers and their principals arise chiefly with reference to the claims of the agents for their commissions on the renewal premiums after their agency has terminated. The employment of such agent is, in the absence of stipulations to the contrary, revocable at pleasure, and no right exists to any commissions on premiums or renewals received after the termination of the agency.[2] The principal may appoint other agents in the same

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[1] Burnes v. Pennell, 2 H. of Ld.'s Cas. 497.

[2] Spaulding v. N. Y. L. Ins. Co. 2 Ins. Law Jour. 853, Me. In this case the court say: "The plaintiff, notwithstanding he has ceased to be an agent, claims to recover a percentage on renewals of policies procured by him when agent, by virtue of the following rule, which fixes the compensation of agents: 'The commission to agents is 10 per cent. on first year's premium, and five per cent. on each renewal collected and transmitted by them. This applies to business procured by the agent under this appointment. Upon the collection of other premiums (the risk being originally obtained by other parties), and upon interest, the commission is 2½ per cent.' The compensation on renewals is for services rendered. It is due 'on each renewal when collected and transmitted,' and then only, by the terms of the rule. The agent has no right to his commission, save on collection and transmission of the premium. The terms of the rule imply the continuance of the agency. When one ceases to be an agent, he cannot rightfully collect, and can have nothing to transmit. The next sentence provides for the collection and transmission of premiums collected by an agent other than the one originally procuring policies, and it gives such agent 2½ per cent. commissions. If one who is no longer an agent can have his commissions on premiums collected and transmitted by another, then the company must pay a commission of 2½ per cent. to the agent collecting and transmitting funds, and 5 per cent. to one who has ceased to be agent, and who has neither collected nor transmitted funds. There can be no mistake as to the meaning of the rule. It allows commissions only to the agent collecting and transmitting premiums paid on renewals, giving to the person procuring the original policy a premium twice as large as that to any other agent by whom premiums are collected."

place, unless there is a stipulation to the contrary,[1] and, even where there is such a stipulation, if the agent ceases to perform any particular portion of his duty, as, for instance, to canvass for applications, or if he fails to remit funds promptly, or to obey the orders of the company, or if he accepts another agency and transfers business to it, he forfeits all claim to renewals and commissions.[2] If an agent is improperly dismissed, he has a right to damages.[3] An agent, after his discharge, has no right to collect renewal premiums, even when he has a valid claim to a commission on them.[4] The measure of the damages does not seem very satisfactorily defined. In Ensworth v. New York Life Insurance Co.,[5] it appeared that by the contract between an insurance company and its agent they agreed that he should receive ten per cent. on the first premiums on policies procured by him, and five per cent. on all renewals as long as such policies remained in force. He was dismissed from his agency because he procured policies for another company, though there was nothing in his contract which forbade his so doing. He thereupon brought his action, claiming to recover at once the commissions on the renewal premiums on all the policies procured by him, and that the tables of insurance companies afforded a means of estimating the amount. On the other hand, the company claimed that, if liable at all, they were only liable in that action for renewal premiums theretofore received by the company, and that he must bring other actions, as premiums were subsequently received. The court instructed the jury that, "If it be found from the evidence that this contract contemplated that the plaintiff should have the absolute right and ownership in the policies obtained by him, to the extent of five per centum on their renewals, during the life of them, and that this right

[1] Myers v. Knickerbocker L. Ins. Co. 2 Bigelow Life & Acc. Cas. 149, Ohio Common Pleas.

[2] *Ibid.*

[3] Machette v. Hodges & N. E. Mut. L. Ins. Co. 6 Phila. R. 296; s. c. 1 Brewster, 313.

[4] Myers v. Knickerbocker L. Ins. Co. *ubi supra.*

[5] 7 Am. Law Reg. N. S. 334, U. S. C. C. N. Dist. of Ohio.

became fixed at the moment, and could not be divided from other duties and other matters, then it is one entire contract, and you must find and fix his damages from the evidence given as to the value of such an interest in the policies. But if the contract contemplated that he was entitled to the commissions on the premiums, only as the policies were renewed from year to year, and the premiums paid to the Life Insurance Company, then the contract is divisible, and he can only sue and recover damages after those premiums for renewals are paid in. In this case the plaintiff would be entitled to recover the amount of the commissions on the renewals only down to the day on which he brought his suit."

For the purpose of affecting the amount of damages it has been attempted to introduce evidence of a custom upon this subject. In one case[1] it was said "that a well-established custom among life insurance companies and their agents, as to the kind and extent of property that agents may possess in the lists of policies they procure, may be considered as explaining the contract as claimed, because the parties are presumed to make the contract in reference to that custom." But in a case in the Supreme Court of the United States,[2] it appeared that the plaintiff became the agent of the company "by his acceptance of a circular, which contained this language: 'The usual compensation of agents, so far as we know, is ten per cent. commission on the premiums, with one dollar for each policy, and five per cent. on the premiums on the renewal of policies.' In about a year afterwards he received another circular, which contained in lieu of the language above cited, the following: 'For your services as above, you will be allowed a commission of ten per cent. on the first premiums (cash and note) and five per cent. on all subsequent renewal premiums, so long as you continue the agent of this company;'" and he acted on this latter paper fifteen years, until he was discharged, and after

[1] Ensworth v. N. Y. L. Ins. Co. 7 Am. Law Reg. N. S. 334, U. S. C. C. N. D. of Ohio.
[2] Stagg v. Conn. Mut. L. Ins. Co. 1 Ins. Law Jour. 9. See also Spaulding v. N. Y. L. Ins. Co. 2 Ins. Law Jour. 853, Me.

that claimed the five per cent. commission on the renewal premiums of policies originally made by him as agent, which had been received by the company since he was discharged. To support his claim, he undertook to prove by other insurance agents that such was the custom as between insurance companies and their agents, but it was held, as a matter of law, that there was an express contract, and proof of custom could not be admitted; that the later circular was substituted as a new contract instead of the first one, and that its fair construction was to limit the agency to the pleasure of the company, and to terminate the right of the agent to commissions on renewal premiums with the revocation of his agency, and that, after having received and acted upon it for fifteen years, he was estopped to deny that that was the contract under which he acted. In a subsequent case in the same court,[1] the agent was employed under a letter in which he was told, "You are working up a business for yourself, and are paid the highest commission which we pay." After his discharge he claimed to be paid immediately the present value of the commission on the renewal premiums on policies issued through his agency, to be ascertained by the actuarial rule used by the company to value policies, and in support of his claim sought to prove by competent witnesses that it was the usage between insurance companies generally and their agents in St. Louis, where the business of his agency was conducted, to pay the commission claimed. But it was held that as the language was neither ambiguous nor technical, the evidence was not admissible, for that would have been to make a contract for the parties, differing materially from the written one, under which they had both acted for some time.

In a recent case in New York the plaintiff was engaged under a contract by which he was to receive during the time he acted as agent, five per cent. commission upon the amount of annual premiums due and payable in each year after the first year of their continuance, upon all policies solicited and

[1] Partridge v. Phœnix Mut. L. Ins. Co. 15 Wall. 573; s. c. 2 Ins. Law Jour. 458.

secured by him, and in case of his death while so acting as agent, defendant agreed to pay to his wife, if she survived him, the commissions accruing thereafter to which he would have been entitled if he had lived and continued to act. The contract contained a provision that either party might cancel it after giving three months' notice of such intent, and if defendant should cancel it, it should continue to pay plaintiff or his wife the commissions as aforesaid, provided he should perform the necessary service in procuring payment of the premium. After two years the agreement was rescinded by mutual consent, and the agency terminated. Plaintiff claimed to recover his commissions upon premiums thereafter received upon policies solicited and secured by him. But it was held[1] that by the terms of the contract a commission upon the premiums accruing upon the policies secured by plaintiff during each year of the continuance of the agency, was a full compensation for the year's service, save where defendant canceled the contract as provided, and plaintiff having voluntarily surrendered the right to perform future services and to receive the compensation therefor, had no right to greater compensation for past services, and could not recover.

In an action by an agent to recover for his salary under a contract, it is a good defense to show that, as an inducement to the company to enter into it, he made false statements as to the amount of business he had procured for another company.[2]

If the physician or next friend referred to in the application makes a wilfully untrue statement, or colludes with the party making the proposal, he may, though not personally interested in the contract, render himself liable to an action if loss should ensue. It is not necessary that the statement should be false to the knowledge of the party making it; if untrue in fact and not believed to be true, and made for a

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[1] Shaw v. Home L. Ins. Co. 49 N. Y. 681.

[2] Barker v. Knickerbocker L. Ins. Co. 24 Wisc. 630.

fraudulent purpose, it is both a legal and moral fraud.[1] But a statement, false in fact, but not known to be so by the party making it, or not made with intent to deceive, but on the contrary believed to be correct, does not make him liable in an action, though the company may have relied on it, for the *scienter* must be proved.[2]

§ 315. Where an agent without the authority of the company agreed with a physician, that if he would take out a policy in the company, he the agent would furnish him applicants for insurance to be medically examined, sufficient at an agreed price for each examination to pay the premiums as they matured, and the agent failed to furnish such applicants owing to his having sold his agency, and the physician thereupon without requesting the agent to pay the premiums suffered the policy to lapse, and sued the agent, it was held[3] that the measure of damages was the amount of the premium due, and for the non-payment of which the policy was suffered to lapse, with interest thereon, it having been the duty of the insured, if he desired the insurance to continue, to have paid in cash to the company each premium as it became due, and then to have looked to such agent for repayment of the premiums.

The court say: "The plaintiff next claims, that there is a contract with the defendant to pay the plaintiff $5,000 in fifteen years, or to his representatives at his death, in case he should die before the expiration of that time; and that the measure of the plaintiff's damages is the cash value of the $5,000 so payable at this, the time of the trial; and that the price of the services, had they been performed, is not to

[1] Bunyon, 39, citing Pasley v. Freeman, 3 T. R. 51; Watson v. Poulson, 15 Jur. 1111; Taylor v. Ashton, 11 M. & W. 415; Whitmore v. Mackeson, 16 Beav. 126.

[2] Shrewsbury v. Blount, 2 M. & G. 475; Rawlings v. Bell, 1 C. B. 951; Chandelor v. Lopus, 1 Smith Lead. Cas. 77. The effect of war and of the recent rebellion, in terminating or suspending an agent's power, and other similar questions, are considered in the chapter on the Effect of War. The question how far the insured, his friend and physician are to be considered the agent of the assured in answering inquiries made of them, has been considered in treating of Warranty and Representation.

[3] Buckner v. Grosvenor, Superior Ct. of Cincin.

be deducted from such amount, because they would have required no material labor or loss of time on the part of the plaintiff. We do not think the claim made by the plaintiff is the fair construction to be given his contract with the defendant; plaintiff's contract for $5,000, to be paid in fifteen years, provided he, the plaintiff, paid the annual premiums as stipulated, was with the insurance company, not with the defendant. The defendant merely agreed that he would furnish him for medical examination enough applicants for insurance in the company as would, at three dollars each, enable him, the plaintiff, to pay to the company such annual premiums; and this is the contract which the defendant has broken. In this view of the case, it was the duty of the plaintiff, when the first unpaid premium became due, November 1st, 1869, as he then knew that applicants for insurance had not been sent him for examination sufficient to pay the same, to have requested the defendant to pay it, and in default to have paid such premium to the company in money himself, and then have sued the defendant for its recovery, with interest, and so of each payment of premium during the period of time the policy had to run. Not having done so, it is his own fault that the policy has been permitted to lapse, and he is only entitled to recover from the defendant, Grosvenor, the amount of the premium due from him to the company, on November 1st, 1869, when he suffered the policy to lapse because of the defendant's breach of the collateral agreement with him, and interest due on the same, up to the present time."

If a person without authority procures an existing valid policy to be canceled, he substitutes himself in the place of the insurer, and is liable to the beneficiary for the amount.[1] An agent is liable to his principal, for the proper performance of his duties.[2] One having general authority to

[1] Gray v. Murray, 3 Johns. Ch. 167; Murray v. Robinson, 7 Albany Law Jour. 415, N. Y. Supreme Ct.

[2] Smith v. Lascelles, 2 T. R. 187; Wilkinson v. Coverdale, 1 Esp. 75; Hurrell v. Bullard, 3 F. & F. 445; Smith v. Price, 2 F. & F. 748.

procure insurance, cannot without special permission procure it in a mutual company, as that makes his principal an insurer of others.[1] It has been doubted, whether a person who takes to a company a check for a premium, payable on a renewal of an expired policy, has any authority to sign a memorandum, agreeing that, in case of death, proof that the insured was in good health at the time of the renewal, shall be furnished.[2]

§ 316 **The Agent of the Assured.**—The assured is, undoubtedly, bound by the acts and representations of his agent who applies for a policy;[3] and if he claims the benefit of a policy, which recites that it is issued on an application filed with the company, he cannot deny that the party who procured it, was his authorized agent, though, in the application, the agent makes a fatal misstatement, without the knowledge of the assured.[4] Concealment or misrepresentation by the agent employed to procure the insurance, of course, binds the assured. The latter cannot claim the benefit of the acts of the agent, without being bound by all his acts and declarations in procuring the policy.[5] If the policy is obtained by the fraud of an agent, even if the fraud is not known to the principal, he cannot retain the benefit of it, and be relieved from the consequences of the fraudulent means by which it was obtained, and in an action to recover back a sum paid upon a policy obtained by the fraud of an agent, it is not necessary to prove the participation in or knowledge of the fraud by the principal.[6] An agent employed to surrender a policy cannot keep it in force for his own benefit.[7]

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[1] White v. Madison, 26 N. Y. 117. [2] Peacock v. N. Y. L. Ins. Co. 1 Bosw. 338.

[3] Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283.

[4] Draper v. Charter Oak F. Ins. Co. 2 Allen, 569.

[5] Fitzherbert v. Mather, 1 T. R. 12; Gladstone v. King, 1 M. & S. 35; Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283; Carpenter v. Am. (F.) Ins. Co. 1 Story, 57; Nicoll v. Am. (F.) Ins. Co. 3 Woodb. & M. 529.

[6] Nat. L. Ins. Co. v. Minch, 53 N. Y. 144; s. c. 2 Ins. Law Jour. 820. To same effect, Lewis v. Phœnix Mut. L. Ins. Co. 39 Conn. 100; s. c. 3 Ins. Law Jour. 123.

[7] Dutton v. Wilner, 52 N. Y. 312, fully stated in the next chapter.

CHAPTER X.

THE PERSONS ENTITLED TO CLAIM UNDER A POLICY AND TO MAINTAIN AN ACTION, INCLUDING HEREIN THE ASSIGNMENT AND SURRENDER OF POLICIES.

§ 317. It is not always easy to decide who is entitled to claim the money under a policy of life insurance, whose receipt is sufficient to discharge the company, and who is entitled to maintain an action, if one becomes necessary. If the policy when issued expressly designates a person as entitled to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of the creditors of the person who paid the premiums and procured the insurance. The receipt of the designated person will discharge the company, and he will be entitled to maintain an action. But various modifications and complications of this simple state of facts may arise. In some cases the person who procures the insurance subsequently changes his mind and attempts, by assignment or otherwise, to deprive the person originally named in the policy of all interest in it. Various questions have arisen, also, where an assignment has been made or attempted of a policy, even where no nominee other than the insured was named in it; and still other questions arise when the insurance is on the life of a husband for the benefit of his wife, and she attempts to assign it during her husband's life time. Questions also arise in some of the States out of their rules as to the proper parties to actions.

§ 318. **On Issue of Policy Title is Vested in Beneficiary named in it.**—We apprehend the general rule to be that a policy, and the money to become due under it, belong the

moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created.[1] The person designated in the policy is the proper person to receipt for and to sue for the money. The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else. If the circumstances are such that the creditors of the person who paid the premium have any claim on the money, they must assert that claim by a creditor's bill in the same manner that they follow any other property which their debtor has put out of his possession. Such seems to be the accepted rule, though the express adjudications are not numerous.[2] In a recent case in New York,[3] the administratrix of a deceased person brought her action upon two policies obtained by her intestate upon his own life, which were on their face payable to the wife and widow of the insured. The plaintiff claimed that the intestate left debts which his personal estate was insufficient to pay, and therefore claimed the right to receive the insurance moneys and apply them in payment of such debts, to the exclusion of the parties named in the policies, on the ground apparently, that the premiums had been paid from his estate when he was insolvent. The company resisted this claim, insisting that the administratrix as such could not maintain an action for the money, but that the parties named in the policies must bring their action, and that, if the creditors had any claim upon the money they must assert it by a creditor's bill; but the court held that the administratrix could maintain the action under the statute of New York, which, while requiring all actions to be in the name of the real parties in

[1] Barry v. Equitable L. Ass. Soc. MSS. N. Y. Supreme Ct.

[2] McCord v. Noyes, 8 Bradf. 139; Succession of Hearing, MSS. Second Dist. Ct. of New Orleans; Succession of Kugler, 23 La. Ann. 455; *post*, §§ 329 to 347.

[3] Greenfield v. Mass. Mut. L. Ins. Co. 47 N. Y. 430.

interest, allows "a trustee of an express trust" to maintain an action without joining the *cestui que trust.*[1] If the person procuring the policy for the benefit of another reserves the right to change the designation in whole or for a part of the amount, he can do so.[2]

It has been held in England that where a person pays a premium upon a policy on his own life, the presumption is that it is for his own benefit, and that where another claims the benefit of it the burden of proof lies upon him, even though the policy is in his name,[3] but such would hardly be the decision in this country. So where one obtains a policy on the life of a third person declaring that he is interested in it, the policy *prima facie* belongs to him, and the presumption is not rebutted by proof that a third party paid some of the premiums.[4]

§ 319. **Meaning of "Representatives."**—There is a difference of opinion as to the meaning to be given to the word "representatives" in a policy. In one case[5] an action was brought by the plaintiff on a policy of insurance on the life of one Loos, in which it was provided that the sum insured should be payable to Loos, if he should be living at the expiration of the term of fifteen years, or, in case of his prior decease, "to his heirs or representatives." Loos died, and his daughter sued as sole heir, to recover the amount. "Whether the

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[1] Pending the action the claims of the differing parties who demanded the money had been reconciled, and the debts had been paid, so that all the claimants were willing that the administratrix should receive the money. The judgment, however, directed how it should be distributed.

In Meyers v. Keystone Mut. L. Ins. Co. 27 Penn. 268, an action was brought by the widow of the insured upon a policy issued on his life for her use. The question was raised that the action could not be brought by the widow, but must be in the name of the personal representatives of the deceased. The court expressed a different impression, but as they held the action not maintainable on other grounds they did not decide the question.

[2] Hutchings v. Miner, 46 N. Y. 456.

[3] Pfleger v. Browne, 28 Beav. 391. Otherwise where the policy payable to the creditor was so taken in pursuance of an agreement with the debtor. Cook v. Black, 2 Jones on Annuities.

[4] Triston v. Hardy, 14 Beav. 232.

[5] Loos v. John Hancock Mut. L. Ins. Co. 41 Mo. 538.

action accrued to the plaintiff, or should properly have been brought by the executor or administrator of Loos, must depend upon the meaning to be affixed to the word 'representatives.' Legal representatives and personal representatives, in the general or professional sense, mean simply executors or administrators. Although this is the primary legal meaning, they are often construed differently, if it is clear that the intention was to vest the estate in a different class of persons. * * The language used by the assured would seem to indicate that it was his intention, in case of his untimely decease, to make some provision for the surviving members of his family, and not that the money arising from the policy should go to his executors or administrators, to be administered on as ordinary assets. Policies for a term of life insurance of this description are of frequent occurrence, and where it is meant that the money resulting from the policy shall descend and be used as common assets, the invariable language is, 'to pay to the said assured, his executors, administrators, or assigns.' The changing of the language and using terms of different expression clearly import that the money was intended for the benefit of his heirs, or next of kin, and that it was not to be administered on as assets by the executor or administrator. The plaintiff is the only child and sole heir, and she is entitled to the money; the word 'representatives,' used in the policy in conjunction with heirs, cannot divest her title or divert the money to another source." In Massachusetts a contrary rule exists. In Wason v. Colburn [1] there was an endowment policy by which the company promised to pay the sum insured "to the said assured, or in case of prior decease, to his heirs or representatives." The court held that the policy "was primarily intended to be for the benefit of the assured himself, being an endowment policy for the period of ten years. In case of his decease within that period, it was made, by its terms, payable 'to his heirs or representatives.' Evidence of his oral declarations, made after he received it, is inadmissible to vary its

[1] 99 Mass. 342.

construction. Nor are mere statements that it was intended for the benefit of his son sufficient to constitute a trust. Upon his death, intestate within the ten years, his administrator, who is his personal representative, became entitled, by well settled principles of law, to collect the amount due, and hold it as part of the estate of the intestate." After referring to the case just cited from Missouri, they say: "The term 'representatives' legally indicates administrators, and we cannot construe it as excluding them." This view seems to us more correct than that adopted in Missouri.

§ 320. **Who is "the Assured," who can Maintain an Action.**— In Hogle v. Guardian Life Insurance Co.,[1] an action was brought by the daughter of one Warner, who himself procured his life to be insured. The company claimed that, as the loss was payable to "the assured, his executors, administrators or assigns," the plaintiff could not maintain the action, though the policy recited that it was for her benefit. The court held, however, that the word "assured" meant not the person whose life was insured, but the person for whose benefit the insurance was made. "It is for her benefit. No one can recover the sum assured until after his death. Subsequent to that event he cannot sue. The fruits of the contract are solely hers. Upon these facts she certainly can maintain the action unless there is some legal rule which prevents it. She is the party in interest," and as such, entitled to maintain the action under a provision of the New York Code which requires actions to be in the name of the real party in interest. This is held to be so, though the policy speaks of the "assured, *his* executors," &c. "We must therefore assume that the promise was to pay the plaintiff, which brings the case within all the authorities. The contract was with Warner, whose life was insured for her benefit, and the promise is to pay her. The action is properly brought in her name, but whether this is so or not, the plaintiff is the real party in interest and can maintain the action. The in-

[1] 6 Robertson, 567; s. c. 4 Abb. N. S. 346.

surance was effected by Warner. He applied for it, paid the premium, took all the initiatory steps for procuring it. It was delivered to Warner; and nothing is clearer than that Warner could make the loss payable to whom he pleased. He did so, making it payable to her." In another case the court said:[1] "The policy recites that the consideration was paid by the plaintiff, and the promise therein is to pay the assured. The term 'assured,' can mean none other than the party paying the consideration and asking for the insurance for *his* benefit."

In Campbell v. New England Mutual Life Insurance Co.,[2] the action was by a wife on a policy on her husband's life and payable to him, his administrators and assigns for her benefit. After two trials the defense for the first time took the objection that, as she was not the administratrix, she could not maintain the action, but the court held that the objection was raised too late. They say: "In the present case the plaintiff, though not the assured, was the person for whose benefit the policy was made, and was therefore the owner of the entire equitable interest, and might have maintained an action upon it in the name and without the consent of the administrator, or, if the latter had collected the amount of the policy, might have sued him for the proceeds. The plaintiff had the equitable interest in the policy, although not the title to support an action at law in her own name against the insurers. The objection now made goes to the foundation of the action, and, if valid and seasonably taken, would have rendered the other grounds of defense immaterial."

Where by the terms of the policy the money was to be paid to the wife of the assured, but it was provided that in case of the death of the said wife before the decease of the husband, the amount should be payable to their children, for their use, or to their guardian, if under age, and the wife died before her husband, it was held, that the action was well brought by the guardian *ad litem* of the children, being under

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[1] Smith v. Ætna L. Ins. Co. 5 Lans. 545.

[2] 98 Mass. 381.

age, and that it was not necessary to bring the same in the name of a general guardian, the decision being, however, in a measure affected by the statute of the State. The court say: "Admitting that the guardian named in the policy is the general guardian, we think that while the words 'payable * * to their guardian,' etc., give the defendant the privilege and make it its duty to pay the sum assured to such guardian, if the children are under age, within ninety days, it does not follow that an action brought to recover the sum assured must be brought in the name of such general guardian. The children are the real parties in interest, and therefore the action is, under the statute, well brought by them in their own names, they *appearing* by a guardian *ad litem*. Even if the general guardian be regarded as a trustee of an express trust, the statute authorizing such trustees to bring actions in their own names, is not imperative, but permissive in its terms."[1]

Where a declaration in an action brought by the daughters of the insured and their respective husbands stated that they by a third person, their trustee and agent, made the contract of insurance, and it showed that all the agreements in the policy were with the trustee, it was held, that the action was properly brought in the name of the plaintiffs. "The general rule is that the suit may be brought, on these policies, when in the form of simple contracts, in the name of the party having the beneficial interest. It is true that the agent, who effected the insurance, is styled in it a trustee, but that does not make him such, as his powers and capacities appear to be those only of an agent."[2]

A policy was taken by a husband on his own life for the benefit of his wife or her assigns. It contained the usual provision for a forfeiture in case of the non-payment of premiums, and a provision for a notice to and assent by the company in case of an assignment. A year after the date of the policy the husband and wife executed under seal, the following as-

[1] Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223.

[2] Hillyard v. Mut. Ben. L. Ins. Co. 35 N. J. 415; s. c. 2 Ins. Law Jour. 137.

signment of the policy: "For value received, we do hereby assign, &c., to W., his heirs, or assigns, the above named policy of insurance, and all sum or sums of money, interest, benefit and advantage whatsoever, now due, or hereafter to arise, or to be had, or made by virtue thereof, to have and to hold unto the said W., his heirs, or assigns." Upon the execution of this assignment, the policy was delivered to W., and at the same time, he gave to the assignors the following receipt: "Received of D. and wife, an assignment of Policy No. 9,238, &c., as security for the prompt payment at maturity, of their note at four months from date, amounting to $220.25; said assignment to be null and void, upon the payment of said note at its maturity—otherwise, to continue for sole use of W." The note referred to in this receipt, was dated June 17th, 1862, and payable to the order of W.; it was signed with the name of the wife, *per* D. the husband, and his name was signed upon the back of it. This note was not paid at maturity, nor at any time thereafter. Notice in writing of the assignment, though not of the receipt, was given to the company by W., on Dec. 17, 1862, and on the following day, the company returned to W., their written assent to it, subject to the conditions of the policy. On Nov. 28, 1865, W. surrendered the policy to the company, and received therefor $1,248.51, he having paid the premiums thereon up to that date. On June 28, 1866, D. and wife brought an action of *trover* against the insurance company, to recover damages for the conversion of the policy. It was held, that the assignment and receipt formed one contract, and constituted a sale or mortgage, rather than a pledge as collateral security for the note, and consequently, the plaintiffs had not, at the time of the alleged conversion and suit brought, the interest and title of bailors, to enable them to maintain *trover*.[1]

§ 321. **To Whom does the Policy Descend.**—In a recent case in Connecticut, the court say:[2] "The company promise to pay the sum insured to the above named party, to whose benefit

[1] Dungan v. Mut. Ben. L. Ins. Co. 3 Ins. Law Jour. 106, Supreme Court of Md.
[2] Keller v. Gaylor, 3 Ins. Law. Jour. 303.

this insurance shall inure, whenever the same becomes due, his executors, administrators or assigns, within three months, &c., and in case of the death of said party for whose benefit this insurance is made, before the decease of the said party whose life is hereby insured, the amount of this insurance shall be payable, after the death of the latter, to his children by her, for their sole use, or to their guardian, if under age." Inasmuch as Mr. Gaylor had no children, nothing became payable under the clause in the policy in their favor. Upon the death of Mrs. Gaylor, no one except Mr. Gaylor's administrator had or could have a right to the insurance money. By the terms of the policy (there being no children) the money was payable to him. He accordingly received it, and it is in his hands as part of the assets of Mr. Gaylor's estate. Thus far the contending parties are substantially agreed. The whole question between them resolves itself into this—whether, there being no debts, the insurance money in the hands of the administrator of Mr. Gaylor shall be distributed to Mr. Gaylor's heirs at law as intestate estate, or whether it shall go to the representatives of Mrs. Gaylor under the residuary clause of Mr. Gaylor's will. In behalf of the heirs at law it is claimed that Mr. Gaylor had no interest in the policy at the time of his death, and that whatever interest his estate ultimately had in the policy came into existence after his death, and not until it had become certain that he could have no posthumous child to take the insurance money. It must be conceded that until some period after his death there was an uncertainty whether a child might not be born to him, which child, on the death of Mrs. Gaylor, might be entitled to the insurance money, and the question is, (1.) Whether this uncertainty makes the interest of Mr. Gaylor in the policy so uncertain as not to be the subject of testamentary disposition; and (2.) Whether, if devisable, the terms of the will are such as to pass the benefit of the policy to Mrs. Gaylor. On the first point, we think it clear that Mr. Gaylor at the time of his death had an interest in the policy which could be bequeathed. The contract under

which the insurance money became payable was made with him, and is by its express terms for his benefit. In a certain event, which never happened, the insurance money would indeed have become payable to his children. The insertion of this clause in favor of his children, however, did not divest Mr. Gaylor of his interest as contracting party in the contract. No other person than Mr. Gaylor ever had any interest in the policy before his death, and his interest then immediately passed to his personal representatives. Mr. Gaylor had at his death a vested interest, liable indeed to be divested by the birth of a child. Had Mr. Gaylor died intestate, this policy would have passed to the administrator as assets, and in general under our law whatever may thus pass is devisable. On the second point the residuary legatee is *hœres factus*, and generally takes whatever the *hœres natus* would take. But it is said that the will speaks from the death of the testator, and only carries such interests as were *in esse* at the testator's death, and not interests which accrue to the estate of the testator after death. The words of Mr. Gaylor's will in favor of his wife are very strong. He gives to her 'All the rest and residue of [his] estate, both real and personal, in whatever it may consist, or wherever situated, to be hers without restraint and absolutely.' We think this language conveys to her all that came to his estate as assets. She is by this clause of the will constituted sole heir of his estate, to the exclusion of statute heirs. She became entitled to the policy of insurance as a chose in action belonging to him at his death. Her representatives are, therefore, we think, entitled to the insurance money received by the administrator, Mr. Budan."

§ 322. The proceeds of a policy on the testator's life pass under a bequest of "any money that he might die possessed of, or which might be due and owing to him at the time of his decease."[1] In Roberts v. Roberts,[2] it appeared that a

[1] Petty v. Willson, 4 L. R. Ch. Ap. 574.

[2] 64 North Car. 695.

by-law of the company provided that the proceeds of policies should be paid "to the widow * * for the benefit of herself and the dependent children of the deceased," with a permission to the insured to appoint an executor to disburse such proceeds, and a prohibition against any disposal, "by will, or otherwise, so as to deprive his widow or his dependent children of its benefits." The widow owned two thousand dollars' worth of other property, and it was, therefore, held that a bequest by which, of a policy of four thousand dollars, one quarter was given to the widow and the remainder to an only child, who had no other property, was not an unreasonable exercise of the discretion vested in the insured.

§ 323. **Statutes for Benefit of Wives and Children.**—Reference has already been made to the statutes allowing an insurance to be made for the benefit of a wife.[1] Their general object is to secure the insurance money to the wife and children free from all claims of the husband's creditors.[2] Statutes similar to those already quoted exist in most of the States, though they vary somewhat in details. In all the States in which such statutes exist, except Connecticut, Massachusetts, Michigan, New Hampshire, Rhode Island, Vermont and Wisconsin, it seems that the life to be insured must be that of the husband of the woman for whose benefit it is insured, but in the States named, any life may apparently be insured for the benefit of any married woman. Michigan, besides a provision in favor of the wife, has another and separate one in favor of children. In Iowa the provision is very sweeping that "a policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured, on attaining a certain age, shall be

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[1] *Ante*, § 25.

[2] They seem to be regarded sometimes as enabling statutes, giving the wife a power to insure her husband's life, which, it was supposed, she would not have possessed without them.

exempt from liability for any of his or her debts." The amount of insurance which is exempted from the claims of creditors varies greatly. In Massachusetts, Illinois, New Hampshire, Pennsylvania, Maryland, Michigan, Vermont, Tennessee and Iowa, there seems to be no limit, but in Illinois, Massachusetts and New Hampshire, if the insurance is found to be in fraud of creditors, an amount equal to the premium is deducted for the benefit of creditors. In Alabama and California the annual premium may be $500, and in Wisconsin $300, and any insurance in excess is not good as to creditors, while in Connecticut, Delaware, New Jersey and West Virginia, the amount is $100, and in Rhode Island, North Carolina, and Missouri, $300, but by the strict reading of the laws in the latter States, it would seem that if the annual premium is in excess of these sums respectively, no portion of the amount is free from the claim of creditors.[1]

§ 324. In Libby v. Libby, administrator,[2] the court state the facts and the law applicable to them, as follows: "Charles Libby, on January 27, 1852, procured a policy of insurance on his own life, payable to his wife, who became legally entitled to the benefit of it by the provisions of the statute. Upon her decease, on April 18, 1852, her son and only child, Oscar Libby, became entitled to it by inheritance; and upon his decease on June 11, 1852, his father, Charles Libby, being his heir at law, became entitled to the benefit of it; and by the common law, the amount payable upon his decease would have constituted a part of his personal estate, in which his creditors might have had an interest. It is provided by statute, 'whenever upon the death of any person who shall leave a widow and issue, or either, upon whose decease any sum or sums of money shall become due on account of any insurance on his life, obtained

[1] An English statute (33 & 34 Vict. c. 93, s. 10) allows a married woman to insure her husband's life for her own benefit, and a husband may make a similar insurance for his wife and children, free from the claims of his creditors, but if it is done with intent to defraud the creditors they are entitled to an amount equal to the premiums paid.

[2] 37 Me. 359.

and effected by said deceased person, such sum of money which is over and above the amount of premium paid by said deceased for such insurance, together with interest on said premium,' 'shall not make any part of the estate of the deceased,' 'but the same shall be distributed, if the deceased died intestate, without diminution, as provided in the sections following.' By the third section it is provided, that the issue shall be entitled to the whole, except the premium and interest thereon, if there be no widow. To bring a case within the provisions of the statute, it must be shown that the policy was effected by the deceased person upon his own life for an amount payable upon his decease, and that he, at the time of his decease, was entitled to the benefit of that insurance, and that he died leaving a widow or issue. No provision is found in the statute requiring that the amount insured should, by the policy, be made payable to the person whose life is insured. It is sufficient that he was, at the time of his decease, legally entitled to the beneficial interest secured by the policy, and that there has been a compliance with the other requirements of the statute. Deducting the premium, with interest upon it, to the time of the decease of Charles Libby, the plaintiff [who was the child of the insured by a former wife] will be entitled to the remainder."

In a recent case in the same State[1] it appeared that a statute provided that "A sum of money received for insurance on his life, deducting the premiums paid therefor within three years with interest, does not constitute a part of his estate for payment of debts or purposes specified in the first section of chapter sixty-six, when the intestate leaves a widow or issue, but descends one-third to his widow and the remainder to his issue; if no issue, the whole to the widow, and if no widow, the whole to the issue. It may be disposed of by will, though the estate is insolvent." Another section provided that there should be omitted from the inventory and

[1] Hathaway v. Sherman, 61 Me. 466; s. c. 3 Ins. Law Jour. 407.

not administered upon as assets, but disposed of as provided in the section first quoted, "Any sum of money becoming due on the death of the deceased from an insurance on his life effected by him, after deducting the amount of premium paid therefor within three years with interest, provided such deceased left a widow or issue." Under these sections it was held that one who died insolvent can make no testamentary disposition of the fund accruing from an insurance policy upon his life if he leave neither widow nor child; in such event, the insurance money becomes assets for the payment of debts, but that if he leaves a widow and children he may bequeath the insurance money among them as he pleases, but he cannot bestow it by will upon any other persons, the power to dispose of the money by will being limited in case of insolvency to a disposition among his widow and children. The court say, "A hasty reading of this section, without reference to other statute provisions, would be likely to carry the idea that any sum of money thus accruing after death, however large in proportion to the estate left by the decedent at his death, no matter what the condition of his estate as to indebtment, was not to be subject to the payment of his debts, but might be disposed of by him in his will to whomsoever he pleased, precisely as he might dispose of any surplus property after his debts were paid. A little consideration, however, satisfies us that there are conditions and limitations here which must not be overlooked. It is manifest that the legislature looked upon this fund, which from its very nature can never be possessed or enjoyed by the decedent, in a different light from that in which they viewed his estate and property generally. * * The questions arising here are, what, if any, are the conditions and limitations of this power to bequeath? Is it effectually exercised when a testator in his will simply gives legacies which his property, after paying his debts, is found insufficient to meet, and concludes by a general residuary bequest? As to the conditions and limitations of the power to dispose of this fund by will, we remark in the first place that it is only

when the insured leaves a widow or issue that he can exercise any testamentary power whatever over this fund if his estate proves insolvent. If he leaves neither widow nor issue, those special provisions have no application to his case at all. The fund is to be inventoried by his executor or administrator as part of his assets, subject to the payment of debts, and it is only upon the residue, after answering all prior legal calls, that any testamentary provisions he may make will take effect. Is it conceivable that when the legislature have made the existence of a widow or issue an essential condition to the exercise of any power over this fund by an insolvent testator, they intended to allow him to bestow it where he pleased, as if he left neither widow, issue, or creditors? There is such an inconsistency here as induces us to believe that such could never have been the design. * * We think that if the legislature had intended in the revision so to enlarge this testamentary power as to permit the insolvent testator to divert the fund or any part of it from his widow and issue, they would not at the same time have made its existence still dependent upon his leaving a widow or issue to survive him. Why make the survivorship of a widow or issue an indispensable condition of a grant of power to a testator to divert the fund not only from his creditors, but also from these very parties who seem to have been designed by the legislature in these provisions to be the exclusive beneficiaries from this species of investment? The object of the legislature seems to have been to designate this very peculiar species of property as a disposition of his funds in advance which any man may make so firmly that, with the exception of certain premiums paid to secure it, the whole shall go after his death for the benefit and enjoyment of those who are in general dependent upon him for support while he lives, without regard to the claims of creditors, and to give him power simply to regulate the proportions in which it should be divided among those interested according to his views of their necessities, or their deserts. * * A man who makes an investment of this sort with these statutes

before him should understand that he makes it for the exclusive benefit of his widow or issue, or some of them, if they, or any of them, survive him, and that in case of the survivorship his testamentary power over it extends only to the designation of those among them who shall receive it, and the shares which each or any shall respectively receive. This, at any rate, must be the construction in all cases where, aside from the fund thus created, the estate is insolvent, *i. e.*, in all cases where, but for this provision of the statute, the decedent could make no valid disposition of the money as against creditors.

"Whether the statute provision ought to be considered as limiting the power of a solvent testator, or of one who by appropriating a portion of the insurance money to the payment of his debts might make his estate solvent, over money thus accruing in cases where the decedent leaves a widow or issue, we deem it unnecessary now to decide, because we find in the will before us no language which we think authorizes us to conclude that it was the intention of the testator to dispose of this fund. * * As to the claim that the fund would pass under the bequest of the residue of the testator's property, we remark that the legislature have placed all funds thus accruing in the same category with the wearing apparel of the deceased and that of his wife and minor children, and the provisions consumed in his family before the appraisal of his estate. Provided he leaves a widow or issue, the legislature have so distinguished between moneys thus accruing after his death and the rest of his property, that they are not assets in the hands of his administrator for any of the ordinary purposes to which the property of persons deceased is devoted by law; but on the contrary they are classed with certain items of a character so peculiar that none of them can be considered as liable to be sold for the payment of pecuniary legacies, or as passing under a general residuary clause. It may be competent for a solvent testator who leaves a widow and minor children, to make by his will a different disposition of his wearing apparel from that which the law would

otherwise make, but assuredly not an article of it would be considered as passing under a general residuary clause, or as liable to be sold for the payment of legacies, unless specifically so ordered. So with the moneys accruing from life insurance policies after the death of the testator. If it be held that under the general statute authorizing the disposition of property by will, a solvent testator, or one whose estate would be solvent with the addition of the fund thus created, may authorize his executor to use this fund for the payment of his debts, and otherwise dispose it in a manner different from that which the law contemplates or will allow in the case of an insolvent estate, we think, in order to effect his object, the testator must use language directly significant of his intention in this respect; that, classed by the legislature as this fund is, it is not to be appropriated to the payment of debts or of any pecuniary legacies couched in general terms merely, even to the widows or children, unless it is expressly referred to as the fund from which such payment is to be made, and that it does not pass by any general residuary clause—in short, that the testator's intention to change the direction which the law gives to this very peculiar species of property, is not to be inferred from general provisions in his will, the fulfillment of which might require the use of such money, but must be explicitly declared."

§ 325. Where a company having authority by its charter to issue policies for the benefit of any married woman, which should be for her sole benefit, issued a policy to the wife on her husband's life, payable to her, her executors, administrators or assigns, and she died before the husband, leaving children, it was decided that her administrator, on receiving the proceeds, held them for the benefit of the children, and that the husband's administrator had no interest in them, though the husband had paid the premiums after her death.[1]

Where a wife insured her husband's life for her "sole use," and the agreement was to pay "the said assured, her

[1] Swan v. Snow, 11 Allen, 224; See Burroughs v. State Mut. L. Ass. Co. 97 Mass. 359.

executors, administrators or assigns for her sole use," but that in case the wife died before the husband it should be payable "to her children, for their use or to their guardian," and the wife died before the husband without ever having had a child, it was held that the policy was her separate estate and passed to her personal representatives, not to the husband's administrator.[1]

§ 326. **Who Entitled to Money where Policy is Procured for the Purpose of Securing Debts.**—In England, numerous cases have arisen where an insurance has been obtained as security for a debt, the question being whether the debtor or the creditor is entitled to the proceeds of the policy after the payment of the debt. The rule seems to be that, if the insurance is effected at the expense of the debtor, either with his prior consent or by his not objecting to charges for premiums in the accounts, and it appears to have been intended as a security only, the debtor or his representative is entitled to the surplus after payment of the debt, but, if the creditor insure with his own funds, the debtor's representatives have no claim. And the same rule seems to be applied to the case where the grantee of an annuity insures the life of the grantor. Even if the debtor knows that the creditor intends to insure his life and that he regulates his dealings with the debtor with reference to that intention, if there is no agreement between them as to the insurance, the debtor and his representatives have no claim to the money.[2] Where an army agent, to secure himself on a running account with an officer, effected insurances in his own name upon the officer's life, and charged the premiums to the officer, it was held by the Vice Chancellor,[3] that the agent could retain out of the proceeds of the policy only enough to pay his debt, and that the balance be-

[1] Roe v. Mut. L. Ins. Co. MSS. N. Y. Supreme Ct. per Charles O'Connor, Referee.

[2] Courteray v. Wright, 2 Giff. 337; s. c. 6 Jur. N. S. 1283; 9 W. R. 153; Moorland v. Isaac, 20 Beav. 389; Holland v. Smith, 6 Esp. 11; see also Freme v. Brade, 2 De G. & J. 582; s. c. 4 Jur. N. S. 746; 27 L. J. Ch. 697; Lea v. Hinton, 5 De G. M. & G. 823; Gottlieb v. Cranch, 4 De G. M. & G. 440; s. c. 22 L. J. Ch. 912; 17 Jur. 704; Triston v. Harley, 14 Beav. 232; Knox v. Turner, 5 L. J. Ch. Ap. 517.

[3] Bruce v. Garden, 8 L. R. Eq. Cas. 430; s. c. 17 W. R. 990; 20 L. T. N. S. 1002.

longed to the officer's estate, though there was no evidence that the officer knew of the insurance other than he had accepted bills drawn on him for the balance of the account which included the premium, though such bills were for round sums. On appeal to the Lord Chancellor this decision was reversed.[1] "The court requires distinct evidence of a contract, that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor." Where a debtor gave a bond with a surety to secure a debt and the premiums on a policy on the debtor's life, and some premiums were paid, but, after a time, the surety refused to pay any more and the creditor paid them, it was held that the surety was still entitled to the benefit of the policy after the debt was paid. The creditor had kept the pledge alive, and the benefit of it accrued to the pledgor.[2]

§ 327. **Effect of Bankruptcy.**—Where a debtor took a policy on his own life, to secure and in favor of his creditor, and paid the premiums thereon, a question arose as to the effect of the debtor being adjudicated a bankrupt. The court say:[3] "It is contended on the part of the assignee, that as the bankrupt took out the policy and for two years paid the premiums, the assignee had a claim to whatever surplus of the amount insured there may be, after paying the debt due Mrs. Van Antwerp, and that she could not retain the surplus, as against the assignee; that the payment of the amount insured will pay her debt; that dividends to her must cease when the amount insured is paid; and that if she shall receive dividends on the three thousand four hundred and fifty dollars, or on that amount less the thirteen dollars and thirteen cents, or less the one hundred and fifty-eight dollars, and then the amount insured shall be paid, she will

[1] 5 L. R. Ch. App. 32; 22 L. T. N. S. 595; 39 L. J. Ch. 334; 18 W. R. 384.

[2] Drysdale v. Piggott, 8 De G. M. & G. 546; s. c. 2 Jur. N. S. 1078; 25 L. J. Ch. 878; Prendergast v. Turton, 1 Y. & C. C. C. 98; Johnson v. Swire, 3 Giff. 194; Myers v. U. G. & L. A. Co. 3 Eq. R. 580.

[3] *In re* Newland, 7 Bankrupt Reg. 477, U. S. C. C. South. Dist. of N. Y.

have received the dividends, and the three thousand four hundred and fifty dollars in addition. Hence the assignee insists that Mrs. Van Antwerp ought to surrender to the assignee her interest in the policy, and prove her claim for the three thousand four hundred and fifty dollars, as a debt unsecured, or else look to the policy as full security, and relinquish all claim on the assets of the estate.

"For the creditor, Mrs. Van Antwerp, it is contended that this policy, the bankrupt being alive, has now no fixed definite value, other than its present cash surrender value of thirteen dollars and thirteen cents; that, outside of that everything is contingent, as well as the continued payment of the premiums, as the duration of life insured, and the continued solvency of the company; that, if the future payment of the premiums shall be made by the creditor, she will be giving to the policy all its value; that the future payment of the premiums may be made by the bankrupt out of after-acquired property, if he does not thereby contravene any provision of the bankruptcy act; that it would not be equitable to require the creditor to deduct from her claim more than the present cash surrender value of the policy; that such value is the entire present value produced by the payments of premiums by the bankrupt; that the entire security which the bankrupt has furnished to the creditor, by making such payments, is the present cash surrender value of the policy; that the contingencies before mentioned make it impossible to consider the present value of the policy as being four thousand dollars; that the one hundred and fifty-eight dollars as the amount of a paid-up policy, which would now be issued for the premiums already paid, ought not to be taken as the present value of the four-thousand-dollar policy, because of the contingencies as to the duration of the life insured, and as to the continued solvency of the company; and that, consequently, the only certain present value is the thirteen dollars and thirteen cents cash surrender value. * * The creditor must, in some proper way, credit on the debt the present value of the security. It seems to me impossible

to say that the present value of the policy is more than its cash surrender value. But for its cash surrender value it could not be said to have any appreciable value.[1] It is true that the bankrupt paid the premiums for two years, but has given no appreciable value to the policy other than its cash surrender value. It is true, that, if the policy were now due, the creditor could not hold as against the assignee, the surplus beyond her debt. But it may require the payment of the premiums for many years before the death of the person insured will make the policy due; and those premiums, with the accumulating interest on the debt, may, with the debt, amount to a sum much larger than the amount of the policy. It would not be proper, even if the creditor should so desire, to compel the assignee to assume the payment of the premiums on the policy for the future. In fifty years, and the assured may live that length of time, the premiums, not calculating interest on them, would amount to about four thousand dollars. Besides, the estate could not be kept unsettled, to carry this policy; and if the assignee took it now, it would be now worth to him to dispose of, in its present shape, no larger a sum than its cash surrender value. That amount he is entitled to have allowed at once on the debt, the balance of it being proved. It is not proper to require the creditor to prove for nothing, and look to the policy alone, because the policy is now worth only the thirteen dollars and thirteen cents." The court therefore held, that the assignee could not require the creditor to elect, either to surrender the policy to him and take a dividend on his claim, or to retain the policy and withdraw her proof of debt, and that she was only obliged to deduct from the amount of her debt the surrender value, and could prove for the balance against the bankrupt's estate. The creditor subsequently received a dividend from the estate, but kept the policy alive by paying the premiums from her own property. The insured died, and the creditor claimed the whole amount of the policy,

[1] Parker v. Marquis of Anglesey, 20 W. R. 162; s. c. 25 L. T. N. S. 482.

being considerably in excess of her credits, and it was held,[1] that the court, in fixing the surrender value of the policy at the terms stated by the company, fixed it as it then stood—as a security created and upheld by the payment of the bankrupt's money, and one to which he had given all the value it then had; and that the policy, after the creditor commenced paying the premiums on it, was substantially a new security, and when her debts were paid from the proceeds of the policy she ceased to be a creditor.

Where a wife possessed of a separate estate procured a policy of insurance upon her life payable upon her death to her husband, and paid the premiums out of her own estate for a year, before the end of which he was adjudicated a bankrupt, and she paid out of her own estate the premiums for the two following years, and before the fourth premium became due she died, it was held,[2] that the husband, as against the assignee in bankruptcy, was entitled to the proceeds of the policy. The court say: "The counsel for the assignee claims that at the date of the bankruptcy of the husband, November 30th, 1869, the husband had a right of property in the policy (which, it is contended, is a *chose in action*) of such a nature that it vested in the assignee by virtue of adjudication in bankruptcy.[3] Under this section, property and rights which are acquired by the bankrupt after the commencement of the proceedings in bankruptcy do not vest in the assignee; and to make good his claim, the assignee must show that the right to the benefit of the policy was one which not only existed in the husband at the time he was proceeded against in bankruptcy, but is one of such a nature as to vest in the assignee as of that time by virtue of the provisions of the bankrupt act. * * If the wife's death had happened before the bankruptcy, there being no statute protecting the husband's rights under the policy, the right to collect and hold the money would, it may be admitted, pass to the assignee.

[1] *In re* Newland, 2 Ins. Law Jour. 860, U. S. C. C. S. Dist. of N. Y.

[2] *In re* Owen v. Murrin, 8 Nat. Bankrupt Reg. 6; s. c. 2 Ins. Law Jour. 524; U. S. C. C. East. Dist. of Mo.

[3] Bankrupt Act, § 14.

But her death did not happen until over two years afterward, during which time the wife continued to pay the premiums. It is admitted that she could not have been compelled to pay them, either by the husband or by the assignee. Her payment of them proceeded purely from her bounty. It is certain to a practical intent, that if she had not paid the subsequent premiums, the first payment, made before the bankruptcy, would have been of no benefit either to the assignee or to the husband, for she did not die during the year. It is also certain to a practical intent that had the last premium not been paid, there would have been no proceeds here about which to litigate. Her intention, her object in making these payments, in virtue of which the policy was kept *in esse*, must have been to make provision for her husband; and what equity, let me ask, have creditors, or the assignee representing them, to thwart the purpose which she had in view, and for which she paid *her* money—money to which they had no claim? The assignee, if it be conceded that he could have done so for the benefit of the estate, which I do not admit nor decide, took no steps to pay the premiums, but asks the benefit of those paid by the wife. It is inconceivable that she made or intended to make the payments for the benefit of the assignee, and she doubtless died in the confident belief that she had made provision for her husband. * * I am quite confident that the husband at the time of his bankruptcy had no such interest in these policies as to give the assignee the right to retain their proceeds as against the manifest intention and purpose of the wife. Could the assignee as against the wish of the wife have said, 'I demand the policy, and intend to keep up the premiums for the benefit of the estate?' If it were necessary to answer this question, it would seem that he would have no such right; and that she could properly say: 'This is a matter of my own, a provision originating in my bounty, one upon which my husband's creditors have no claim, and with which they have no right to interfere.' But the assignee took no such steps; on the contrary, he allowed, or did not

prevent the wife from making the payments which kept the policy alive; and I rest my judgment against him on the broad ground that under the circumstances of the case, the creditors, for whose benefit the money is sought, have not the shadow of a shade of equity to it, nor to defeat the provident and just provision which the wife intended to secure for her husband, not for them. The policy was kept up by her for the benefit of her husband after her death, not for the benefit of his creditors before his bankruptcy."

§ 328. **Policy is Assignable.**—A policy of insurance is assignable as well absolutely as by way of mortgage or pledge to secure a debt.[1] Policies are choses in action, governed by the same principles applicable to other agreements involving pecuniary obligations,[2] though in States in which the strict rules of the common law prevail, such assignments are recognized only in equity, the assignor being treated after the assignment as a trustee for the assignee, and compelled to allow the latter to use his name in an action.[3] Where a person, who had obtained policies on his own life, assigned them in in part as security for a debt, the remainder to be paid to his widow, and the company were notified of the assignment, it was held that the assignment completely transferred the title to the assignee and the wife, and that the husband's administrator had no claim. The court say:[4] "Whether creditors, who did not intervene before the transfer of title was perfected, can impeach the assignment of a contract which rested merely in contingency, and which was of such a character as the law sanctions by its policy in view of the relation of husband and wife and the rights of creditors, is a question I do not think necessary for me to pass upon. The assignments being valid, so far as the intestate and his representatives are

[1] Anthracite Ins. Co. v. Sears. MSS. Supreme Ct. of Mass.; Emrick v. Cookley, 4 Chicago Legal News, 465, Court of Appeals, Md.; Norwood v. Guerdon, MSS. Supreme Court of Ill.

[2] St. John v. Am. Mut. L. Ins. Co. 2 Duer, 419; s. c. 3 Kern. 31; Palmer v. Merrill, 6 Cush. 282; Ashley v. Ashley, 3 Simons, 149.

[3] Ashley v. Ashley 3 Sim. 149.

[4] McCord v. Noyes, 3 Bradf. 139.

concerned, and, if fraudulent as to creditors, only invalid to the extent of their claims, they have their remedy in equity, if any wrong has been done against the assignee and the *cestui que trust.* The latter both claim adversely as against the estate of the intestate. * * If a court of competent jurisdiction shall adjudge the assignments void as respects creditors, the case will present a new appearance."

So, where[1] a policy was assigned under an agreement that the proceeds should be received by the assignee, and in case other securities held by him were insufficient to pay the debts of the assignor to him, the proceeds were to be applied to pay those debts, and the residue was to be paid to the assignor's wife for her sole and separate use, it was held the claim of the assignee to collect the whole money was indisputable, and that the wife was entitled to the surplus, after paying the debts, as against the administrator of the assignor.

§ 329. **What Constitutes an Assignment.**—The question as to what acts constitute an assignment of a policy seems not to have been raised in this country except in a single case in Massachusetts, in which[2] it was held that where the assured by indorsement on the policy assigned a part interest in the policy to a third party, and gave notice thereof to the company, but retained possession of the policy, and subsequently died insolvent, the assignee acquired no preference over other creditors. The court say: "The claim of the plaintiff is, that this was an assignment *pro tanto* of the policy, as collateral security for several notes described in the report. After the decease of Spaulding, and notice to the insurers, the plaintiff demanded of them the $400, part of the loss, which the insurers declined paying, on the ground that the assignment was not in the form usually required by them, and besides, that they did not think themselves obligated to pay the amount of the policy in instalments. Subsequently on the demand of the defendant as administrator, the insurers paid the full amount to him. The question is, whether the case

[1] Harrison v. McConkey, 1 Md. Ch. Dec. 34.

[2] Palmer v. Merrill, 6 Cush. 282.

shows an assignment which vested any interest in this policy, legal or equitable, in the plaintiff. The policy was an executory contract, a chose in action, available as a legal contract only to Asa Spaulding and his personal representatives. According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover a judgment for his own benefit. But in order to constitute such an assignment, two things must concur: first, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and according to the nature and circumstances of the case, deliver to the assignee or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the chose in action consists, and as far as practicable place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable. The transfer of a chose in action bears an analogy, in some respect, to the transfer of personal property; there can be no actual manual tradition of a chose in action, as there must be of personal property, to constitute a lien; but there must be that which is similar, a delivery of the note, certificate, or other document if there is any, which constitutes the chose in action, to the assignee, with full power to exercise every species of dominion over it, and a renunciation of any power over it on the part of the assignor. The intention is, as far as the nature of the case will admit, to substitute the assignee in place of the assignor as owner. It appears to us that the order indorsed on this policy, and retained by the assured, fails of amounting to an assignment in both of these particulars. We do not question that an assignment may be made of an entire fund, in the form of an order drawn by the owner on the holder of the fund or party indebted, with au-

thority to receive the property or discharge the debt. But if it be for a part only of the fund or debt, it is a draft or bill of exchange which does not bind the drawee or transfer any proprietary or equitable interest in the fund until accepted by the drawee. It therefore creates no lien upon the fund. * * It seems to us quite clear that the plaintiff acquired no such interest in this policy as would enable him to maintain an action against the insurers. He seems himself to have thought so too; for although he demanded the amount of them, which they refused to pay for reasons which seem to be conclusive, he yet declined bringing any suit against them, but permitted them to pay the money over to the administrator. If the plaintiff had no such legal or equitable interest in the debt due on the policy as would enable him to maintain an action or suit in equity, either in his own name or in the name of the administrator of the assignor, for his own benefit, it seems difficult to perceive on what ground he had any equitable lien on the debt due by the policy; and if he had not, then the administrator took it as general assets, charged with no trust for the plaintiff. It appears to us that a contrary doctrine would tend to a great confusion of rights. A man cannot by his own act charge a personal chattel, a carriage and horses, for instance, with a lien in favor of a particular creditor, and yet retain the dominion and possession of them till his death; *a fortiori*, where he retains the memorandum or instrument of transfer of such chattel in his own possession and under his own control, it seems to us equally impracticable to charge a debt due to him, by an order or memorandum retained in his own possession, purporting to give to a particular creditor an equitable lien by the assignment of such chose in action, without a transfer or delivery of the security by which it is manifested. Such an assignment would not constitute the debtor himself a trustee to the creditors; what trust then devolves on the administrator? Were the law otherwise, an administrator, instead of succeeding to the property and rights of his intestate, to be administered and distributed

equally amongst all the creditors, might be obliged to dispose of it in very unequal proportions, according to such supposed declaration of trust. These considerations apply with peculiar force to a policy of insurance on the life of the assured himself, on which no money can become due until the death of the assured, at which time all his rights devolve on his personal representative. If, therefore, it is intended to supersede the right of the personal representative, it must be done in the mode required for a complete assignment of the whole contract."[1]

In Pomeroy v. Manhattan Life Insurance Co.,[2] an assignment of a part interest in a life policy was held good in equity. It is not stated whether there was any delivery of the policy to the assignee, but the court do not seem to consider delivery essential.

In St. John v. American Mutual Life Insurance Co.,[3] the only proof of the wife's interest in the policy, seems to have been derived from an entry made in the books of the company at the time of its issue, that it was for her benefit, and the court held that this made her the equitable owner of the policy as soon as it was issued, and that though delivered to the husband, he held it merely as trustee for her. In a Louisiana case,[4] simultaneously with the application for the policy on the husband's life, a transfer to his wife was executed by him, and the court say that the transaction was "precisely the same it would have been if her name had been inserted in the policy with the written approbation of her husband."

§ 330. **The English Rule as to what Constitutes an Assignment.**—The question of what is necessary to constitute an assignment has been repeatedly raised in England. It is there

[1] Bigelow, in his Life & Accident Insurance Reports, says: "In the copy of 6 Cush., in the Social Law Library, Boston, there is a slip pasted at the end of this case which reads as follows: 'It having been suggested in the argument that other facts existed, not appearing in the report, showing that the assignments had been delivered to the respective assignees, at the time, notice thereof given to the company, and assented to by them, expressly or by implication, a new trial was granted, on which the plaintiffs obtained verdicts and judgments.'"

[2] 40 Ill. 398. [3] 2 Duer, 419, 430. [4] Succession of Richardson, 14 La. Ann. 1.

involved with various questions not applicable in this country. Chief among these is the provision of the bankrupt laws, which conclusively holds to be the property of the debtor any property which, with the consent of its owner, is left in the debtor's possession or under his control. As a result of this, the actual physical transfer of the policy, and a notice to the insurer of the assignment becomes important, if not necessary, as against the claim of the assignee in bankruptcy.[1] Moreover, questions of what is a good transfer in equity, though not so in law, arise from the adherence to the common-law doctrine that a chose in action is not assignable at law. In Chowne v. Baylis,[2] where a letter had been written by the owner of the policy, saying, "Please to take notice that I wish to transfer my interest in the policies," to a person named, and this was shown to the company and noted upon their books, it was held that this constituted a good equitable assignment, as against a subsequent assignee who had obtained possession of the policies. A mere direction to the office, noted on its books, to send letters relating to a policy to a particular firm of solicitors, who thereafter paid the premium for their principal, is not notice of an assignment sufficient to prevent the policy from passing to the assignees in bankruptcy as property in the reputed ownership of the bankrupt.[3] A delivery and deposit of the policy for the purpose of an assignment, with notice to the company, operates as such without any writing, as against the assignee in bankruptcy.[4] And a deposit with a letter agreeing to assign, but without notice to the company, is a valid assignment within a clause making the policy good in the hands of a *bona fide* assignee in case of the suicide of the insured.[5] Under a similar clause making the policy void in case of suicide, unless it "shall have been legally assigned," it was held that this meant "validly and effectually assigned," and that an equi-

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[1] Ryall v. Rowles, 1 Ves. Sen. 348; s. c. 1 Atk. 165; Dearle v. Hale, 3 Russ. 1, 24; Edwards v. Martin, 1 L. R. Eq. Cas. 121.

[2] 31 Beav. 351. [3] West v. Reid, 2 Hare, 249. [4] *In re* Styan, 1 Phillips Ch. 105.

[5] Cook v. Black, 1 Hare, 390. See also Moore v. Woolsey, 4 E. & B. 243; s. c. 24 L. J. Q. B. 40; 1 Jur. N. S. 468; 28 Eng. Law & Eq. 248; *ante*, § 245.

table charge by a mere deposit of the policy, without notice to the company, came within the exception.[1] So where it was to be void unless it should have been assigned to a third party for a valuable consideration not less than six months before the death, it was held that a letter to a third party, written three years before the death, charging the policy with a floating balance due to him, brought the policy within the exception.[2] Where a person insured his life, and by deed subsequently assigned the policy, and the assignee gave notice to the company, and subsequently paid all the premiums, though he never received the policy, it seems to have been held that he acquired the title to it, even against one who had innocently advanced money on it to the assignor after the assignment.[3]

The possession of the policy is not conclusive proof of the right to receive the insurance money. The right to the money may be assigned without any reference to the policy.[4] But payment of the premium, without any contract with the person entitled to the benefit of the policy, gives no title to it.[5] A deposit of a policy on a loan of money gives an equitable lien,[6] and may cover subsequent advances, though the mere possession, without further evidence, does not.[7] The question is, what was the agreement of the parties?

A voluntary gift must be complete; the grantor must not have reserved any *locus pœnitentiæ*. If the grantee of a policy expressly declares himself a trustee of the moneys assured, it is enough. So is a direction to a trustee, or to the company, or a depositary, to hold for a particular person when assented to and acted upon.[8] All that is necessary is something to

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[1] Dufaur v. Professional L. Ass. Co. 25 Beav. 599; s. c. 4 Jur. N. S. 841; 27 L. J. Ch. 817.

[2] Jones v. Consol. Invest. Ass. Co. 26 Beav. 256; s. c. 5 Jur. N. S. 214; 28 L. J. Ch. 66. See cases cited *ante*, § 246.

[3] Neale v. Molineux, 2 C. & K. 672.

[4] Wood v. Phœnix Mut. L. Ins. Co. 22 La. An. 617.

[5] Burridge v. Row, 1 Y. & C. C. C. 183; Aylwin v. Witty, 30 L. J. Ch. 860.

[6] Maugham v. Ridley, 8 L. T. N. S. 309; *ex parte* Langston, 17 Ves. 227; *ex parte* Whitbread, 19 Ves. 209; *ex parte* Kensington, 2 V. & B. 79; Ede v. Knowles, 2 Y. & C. C. C. 172; Wells v. Archer, 10 S. & R. 412.

[7] Chapman v. Chapman, 13 Beav. 308.

[8] *In re* Magawley's Trust, 5 De G. & S. 1; see McFadden v. Jenkins, 1 Phil. 153.

show an intention to give in such a way as to place it beyond the power of the donor. But the question of difficulty is to decide in a particular case, whether the voluntary settlement has been properly executed. The chief point of dispute has been, whether there was an irrevocable settlement in a case where the policy was retained by the grantor, and no notice was given to the insurer. In Fortescue v. Barnett,[1] the court seems to have held that, in such a case, the settlement was good, as against every one but the company, which had accepted a surrender of the policy, without notice; but in Ward v. Audland,[2] it was held that a voluntary assignment, without notice to the company, where the grantor retained the policy, was not complete. The subsequent case of Kekewich v. Manning,[3] seems, however, to overrule the case last cited.[4] Bunyon suggests[5] the question whether, inasmuch as a voluntary settlement may be made valid by an *ex post facto* consideration, such a consideration is not created if the person alters his position, as by the payment of premiums? A voluntary assignment is void as to creditors.[6] A policy may be the subject of a *donatio mortis causa.*[7] A policy on the life of a debtor passes under a general bequest, as that of "debts and debentures."[8]

§ 331. **American Rule less Technical.**—In this country, it is believed that nearly or quite all of these refinements, as well as those relating to notice, are of comparatively little importance. Subject to the claims of creditors to avoid a transfer made in fraud of their rights, any act which indicates an intention to transfer the interest in the policy, whether voluntarily or for a consideration, will be held good, and the first

[1] 3 M. & K. 36; see Edmunds v. Jones, 1 My. & Cr. 226. In a note to this case many decisions are collected.

[2] 8 Beav. 201.

[3] 1 De G. Mac. & G. 176.

[4] See, also, Richardson v. Richardson, 3 L. R. Eq. Cas. 686, 693; Bunyon, pp. 332 to 337.

[5] P. 338. He cites in favor of this view Godsal v. Webb, 2 Keen, 99; Smith v. Cherrill, 4 L. R. Eq. Cas. 390.

[6] Stokoe v. Cowan, 29 Beav. 637; s. c. 7 Jur. N. S. 901; 30 L. J. Ch. 882; 9 W. R. 801; 4 L. T. N. S. 695.

[7] Amis v. Witt, 33 Beav. 619; see Witt v. Amis, 30 L. J. Q. B. 318; s. c. 9 W. R. 691; 7 Jur. N. S. 499; 4 L. T. N. S. 283.

[8] Phillips v. Eastwood, Lloyd & G. Cas. temp. Sugd. 270.

assignee gets an absolute title, though he does not obtain possession of the policy nor give notice to the company. Where an insured assigned a policy by a written instrument to a third person in trust for his children, and deposited it in the safe of the firm, of which the assignee was a member, in an envelope addressed to the assignee, with his name and residence, with the words: "Please send this to him after my death," it was held, that the assignment having been made when the assignor was solvent, there was a sufficient delivery to the trustee to make it valid as against the creditors of the assignor, who had died insolvent. But it was held that the creditors could claim from the proceeds the premiums paid after the assignor became insolvent.[1]

§ 332. **Rights of Assignee.**—Of course the assignee takes the policy subject to all the equities which attached to it in the hands of the assignor.[2] If invalid in the assignor's hands by reason of a breach of condition, or of a false representation, it is equally so in the hands of the assignee, unless there is some provision to the contrary in the policy, as in the case of suicide.[3] The assignment of the policy carries with it all dividends or other benefits then accrued or which may thereafter accrue upon it, and the same is true if the transfer is by gift or legacy, even though in the will it is referred to as a policy for the original sum.[4]

Fraud on the part of the assignee in procuring the assignment will vitiate the transaction. Thus, if the assignee knows of the death or dangerous illness of the assured, and conceals that fact from the assignor, and depreciates by his conversation the value of the policy, an assignment of it will be held void.[5] Where the person, during whose life an an-

[1] Estate of Trough, 8 Phila. R. 214.

[2] Mitchell v. Mut. L. Ins. Co. Superior Court of Baltimore, not reported; Swick v. Home L. Ins. Co. 2 Dillon, 160; s. c. 2 Ins. Law Jour. 415; see Gatayes v. Flather, 34 Beav. 387; Mangles v. Dixon, 3 H. of Ld.'s Cas. 702.

[3] Dormay v. Borradaile, 10 Beav. 335.

[4] Roberts v. Edwards, 9 Jur. N. S. 1219; Parkes v. Bott, 9 Sim. 388; Courtney v. Ferrers, 1 Sim. 137; Johnson v. Johnson, 15 Jur. 714; Gilly v. Burley, 22 Beav. 619; s. c. 2 Jur. N. S. 897.

[5] Jones v. Keene, 2 Mood. & Rob. 348; see Turner v. Harvey, Jac. 169; Brealey v. Collins, You. 317.

nuity was payable, was actually dead at the time of a sale of the annuity, though that fact was unknown to both vendor and vendee, it was held that the transaction was void, and the purchaser entitled to recover what he had paid, as having been paid without a consideration.[1] So if the assignment is procured by undue influence, or by moral duress, as by threats of imprisonment of the husband of the assured.[2]

§ 333. **Notice of Assignment.**—Notice of assignment is not necessary in this country unless required by the policy.[3] In Mutual Protection Insurance Co. v. Hamilton,[4] the court say: "The question as to the necessity of the knowledge and assent of the underwriters to the assignment of a policy, is very different with reference to fire policies, from life and marine policies. The assent of the insurer to the assignment, in order to give it validity as against the office, in the case of a fire policy, is generally admitted; and notice of the assignment must therefore be given, or the assignee will not be entitled to demand the insurance money. The reason of this requirement in fire policies is obvious. In such cases, the personal character of the assured for integrity and prudence is a most important consideration. In the language of the books, there is infused into the contract of fire insurance something of the nature of a choice of persons. The insurer might be quite willing to underwrite a policy for one person, but not for another of different character and habits. The known reputation of the assured might be an ample guaranty that he would not secretly destroy his own property, with a view to recover the insurance money, while that of the assignee might furnish no such assurance. But no such reason exists in the case of an insurance on the life of an individual, nor in the case of a marine policy. And in the latter cases, the assent of the insurer to the assignment of the policy, or notice of such assignment, is not indispensable, in order to entitle the assignee of the policy to recover the money from the insurer. We are of opinion, therefore, that

[1] Strickland v. Turner, 7 Exch. 208.
[2] Eadie v. Slimmons, 26 N. Y. 9.
[3] Mut. Prot. Ins. Co. v. Hamilton, 5 Sneed, 269; N. Y. L. Ins. Co. v. Flack, 3 Md. 341.
[4] 5 Sneed, 269.

as between the insurer and the assignee of a life policy, notice of the assignment is not required to complete the right of the latter to receive the insurance money from the former. Upon this principle, as it seems to us, the right of the assignee must be held to be perfect in a case like the present, by force of the assignment alone. This must be so, if we are correct in the assumption, that by the transfer he becomes instantly invested with the legal interest in the policy, for if he takes nothing more than a mere equitable interest under the assignment, it will perhaps inevitably follow that the debt still continued subject to the order and disposition of the assured, so far, at least, as, after his death, a payment to his personal representative, without notice of the assignment, would protect the insurer from paying the money a second time to the assignee. That the assured has an assignable interest, and that a life policy is assignable, admits of no question. This is so; first, upon the general principle of law applicable to this subject. Secondly, it is so by the express stipulation of the contract. By the terms of this policy, the contract is with 'the assured, his personal representatives and assigns;' and the promise, in fact and in law, is to pay the money to the personal representative or assignee, as the case may be, within sixty days after due notice and proof of the death of the person assured. * * We have seen that the assignment, *ipso facto*, effects the latter object, by divesting the assured of all interest in, and power of disposition over, the policy. And as regards the underwriter, no such hazard can be supposed to exist. He cannot be required to pay the insurance money without the production of the policy, if in existence; or, if lost, without sufficient proof of that fact. Neither can he be required to pay without sufficient proof that the person demanding payment occupies the relation or character assumed by him; and that he is by law, as the rightful assignee of the policy, or personal representative, entitled to receive the money. Such being the law, the underwriter is exposed to no risk, except such as may be the result of his own carelessness, against which the law entitles him to no protection." After this decision had been ren-

dered, it appeared that at the foot of the policy was the following: "N. B. If assigned, notice to be given the company;" and after further consideration the court add: "The only reason for such notice would be to secure the company against the hazard of loss from paying the money to the personal representative of the assured, and being compelled to pay a second time to the assignee. What might have been the consequences to the assignee if the money had been paid to the personal representative, or if it had been attached by the creditors before the knowledge of the assignment on the part of the company, we need not stop to consider, as neither of these things occurred in the present case. And as the company sustained no possible injury for want of such notice, the omission cannot be set up as a defense against the right of the assignee to recover the money."

Where the policy provided that it should be paid to "the legal representatives" of the insured, but it was made with the "assured, his executors, administrators and assigns," and at the bottom were the words, "N. B. If assigned, notice to be given to the company;" it was held that the insured could, during his lifetime, assign the policy, and that notice of the assignment, given after death, but within two days after the assignment, was sufficiently early.[1] The court say: "Taking into consideration the whole instrument, our opinion is that the provision to pay to the legal representatives was designed to apply only to a case where the assured died without having previously assigned the policy, and not to be construed as in any sense limiting the power of the party insured to assign. The *nota bene* at the close of the policy was evidently inserted for the protection of the company. Knowledge of the assignment could only be important to it in one view: to prevent the possibility of its being compelled to pay both the assignee and the legal representatives of the insured."

§ 334. Where the policy provided that any assignment without the assent of the insurers should be void, and the

[1] N. Y. L. Ins. Co. v. Flack, 3 Md. 341.

insured made such an assignment to one who had no interest in his life, it was held that the assignment conveyed no right either in law or equity to the proceeds when due.[1] In Louisiana it is held, under a provision of its civil code, that an assignment of a life policy, without notice to the company, has no effect as to creditors of the assured, where there is no proof of the acceptance of the assignment by the assignee, and the policy remains in the hands of the assignor.[2]

§ 335. It is held in England that a subsequent assignee, who takes without notice of the prior assignment and first gives notice to the company, has the prior claim, even though the first assignee gets possession of the policy,[3] unless the subsequent assignee has been guilty of negligence in inquiring after and seeking to obtain possession of the policy,[4] but it is believed that in this country the first assignment would be held the valid one. As to notice, a statement that a person is the holder is sufficient,[5] so is a verbal notice,[6] but a casual mention to a clerk in paying the premium is not sufficient;[7] nor a casual mention by the insured to the secretary that the policy has been deposited.[8] Notice to an agent authorized to receive notice is, of course, good, even though he fails to transmit it to the company,[9] but this does not extend to a case where the agent is himself interested in the policy.[10] Bunyon says[11] that "as between the vendor and vendee the contract is conclusive, but in order to render it altogether indefeasible notice of the assignment to the insurers is requisite, and it is in all cases proper that the policy should be delivered to the purchaser. * * Until notice has been given, the vendor, moreover, has it in his power to defeat the assignment by surrendering the policy, or any

[1] Stevens v. Warren, 101 Mass. 564; *ante*, § 30, note.

[2] Succession of Risley, 11 Rob. La. 298.

[3] Foster v. Cockerell, 9 Bligh, N. S. 332, 376; Neale v. Molyneaux, 2 C. & K. 672.

[4] Stocks v. Dobson, 17 Jur. 223, 539; s. c. 4 De G. M. & G. 11.

[5] *Ex parte* Stright, 2 Dea. & Chit. 314.

[6] North Brit. Ins. Co. v. Hallett, 7 Jur. N. S. 1263; s. c. 9 W. R. 880; Gale v. Lewis, 9 Q. B. 742.

[7] Edwards v. Scott, 2 Scott, N. R. 266.

[8] Edwards v. Martin, 1 L. R. Eq. Cas. 122.

[9] Gale v. Lewis, 9 Q. B. 730.

[10] Brown v. Savage, 4 Drew. 1020.

[11] P. 208.

bonuses which have accrued thereon, to the office, and for this purpose it is not necessary that any money should actually pass, but a *bona fide* settlement of accounts * * would be conclusive against the prior incumbrancer who had neglected to give notice."[1] But no acknowledgment of notice is necessary.[2] If, after notice, the company pays to another, it may be compelled to pay a second time.[3]

§ 336. **Right to Maintain an Action on the Policy.**—A policy of insurance is not under the common law such a chose in action as, if assigned, gives to the assignee a right to maintain an action upon it in his own name. In most of our States the assignability of a policy of insurance is, however, recognized by statutes, applicable alike to them and to other choses in action.[4] Where such is not the case, the assignee is allowed to bring an action in the name of the assignor either at law or in equity.[5] In England by a recent statute[6] it is provided that any person becoming entitled by assignment or other derivative title to a policy, and possessing at the time of bringing the action the right in equity to receive and the right to give an effectual discharge to the insurance company, may sue in his own name under certain restrictions.[7]

Where a policy of insurance was made to one and payable to him, it was held,[8] that the person whose life was insured could not maintain an action to avoid the policy on

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[1] Stocks v. Dobson, 17 Jur. 223, 539; s. c. 4 De G. M. & G. 11.

[2] *Ex parte* South, 3 Swanst. 392; Lett v. Morris, 4 Sim. 607.

[3] Bunyon, p. 258. Bunyon says, with reference to inquiries made by intending mortgagees or purchasers as to notices received by the company, "that it is the duty of the insurers to answer all inquiries made *bona fide* for this purpose: that it is not obligatory upon them to volunteer information, unless from the terms of notice or inquiry, they are distinctly informed of a state of facts in which a pecuniary loss would be sustained by reason of their withholding it." See Mangles v. Dixon, 3 H. of Ld.'s Cas. 702.

[4] St. John v. Am. Mut. L. Ins. Co. 2 Duer, 419; s. c. 3 Kern. 31.

[5] Pomeroy v. Manhattan L. Ins. Co. 40 Ill. 398; Palmer v. Merrill, 6 Cush. 282.

[6] 30, 31 Vict. c. 144; s. 1. As to this Act see Bunyon, xxiv.

[7] Among other restrictions it is provided that no assignee of a policy can sue on a policy until he has given notice of the date and purport of the assignment to the company at its principal place of business, and every company is obliged in its policies to designate such place. Every company receiving notice is obliged, on request, to give an acknowledgment of its receipt. The same statute regulates priority of claim under any assignment by the date of notice. See Bunyon, p. 240, 242.

[8] N. A. L. Ins. Co. v. Wilson, MSS. Supreme Ct. of Mass.

the ground of fraud, and, even though the money paid for premiums was his own, could not recover it back.

§ 337. **No One other than the Beneficiary Named in the Policy can Assign, Devise, or Surrender it.**—Where the policy designates a person to whom the insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums has no authority, by will or deed, to change the designation or title to the moneys.[1] He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit. The change of designation can only be made by the person originally designated, and therefore all of such persons must concur in the change. If the policy is for the benefit of a woman and her children, the children as well as the woman must concur.[2] In Gould v. Emerson,[3] it appeared that the father of the plaintiff had procured a policy on his life by which the company agreed to pay the sum insured to him, his executors, administrators or assigns, "for the benefit of his widow, if any, and his then surviving child or children." The father subsequently made a will, in which he in terms excluded the plaintiff, his daughter, and gave to his wife, whom he appointed his executrix, the money to be received on the policy. She collected the money and the plaintiff brought her action for half of the amount. The court say: "The rights of the parties are regulated by the statute law of Massachusetts. It is unnecessary, therefore, to consider whether, by the general principles of equity jurisprudence, the policy of insurance on the life of Alonzo P. Gould, for the benefit of his wife and children, would have constituted an executed voluntary settlement which he could not have revoked by a subsequent like settlement or by will, and which could have been enforced against his representatives. The general statutes in accordance with which this policy

[1] Succession of Kugler, 23 La. Ann. 455.

[2] See cases under next sections; see, also, Fortescue v. Barnett, 3 My & K. 36.

[3] 99 Mass. 154.

was issued, provide that a 'policy of insurance on the life of any person, expressed to be for the benefit of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors.' * * It proceeds upon the theory that the interest of a man's wife and children in his life, and his duty to make reasonable provision for their support, are not wholly subordinate to the claims of his creditors; and that he may make an irrevocable settlement of a policy of insurance on his life for the benefit of his family. The words of the statute are too clear to be misunderstood. Even 'if the premium is paid by any person with intent to defraud his creditors,' only 'an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of his creditors.' The security is declared by the statute to be not merely independent of the creditors of the husband or of those of the person effecting insurance, but independent of the husband or the assured himself. The manifest purpose is, not only to prevent the creditors from reaching the fund by proceedings in law or equity, but to restrain the debtor from revoking, in a moment of caprice or embarrassment, the trust which he has once created upon a meritorious, and by the statute, a sufficient consideration. * * The policy upon the life of Alonzo P. Gould is expressly made payable, upon his death, 'for the benefit of his widow, if any, and his then surviving child or children.' The rights of the widow and the surviving child are fixed by the policy; and, as their proportions are not otherwise specified, they must take equal shares. The assured could not affect, by his will, the construction of the policy or the distribution of the proceeds thereof. The contract of the insurance company having been made with the assured, his executors, administrators, and assigns, the defendant, as his administrator, might by law collect the amount of the policy. But it was not general assets in his hands, liable to the payment of debts, or to distribution under the will of the deceased or the law of his domicil. The defend-

ant held it in trust, to be paid over to the widow and child of the deceased in equal parts. The plaintiff does not claim as a creditor, legatee, or distributee, but as *cestui que trust* of money in regard to which the trustee has no duty but immediate payment. The plaintiff may, therefore, upon familiar principles, recover the amount due to her, as money had and received to her use. The defendant is entitled to deduct, out of the money collected, his expenses of collection, which may include the expenses of taking out administration here, if this was the only estate of the deceased in this commonwealth." As in such case the administrator has a title, and can maintain an action against the company, the *cestuis que trust* cannot, but must settle their rights otherwise.[1]

§ 338. In Ruppert v. Union Mutual Insurance Co.,[2] a policy on the life of a testator provided that it was "for the sole and separate use and benefit of his three children," naming them, the said sum to be paid "to the said assured, their executors, administrators, or assigns." After the issue of the policy, the testator by will devised it to his executors, in trust for other purposes, and they brought their action upon it, but the court held that as the charter of the company provided that policies might be issued for the benefit of any minor, and should inure to his benefit, "independently of the one whose life may be thus insured," the children of the insured became vested, immediately upon the delivery of the policy, with the entire beneficial interest in the sum insured, and that it was then beyond the control of the testator, and that the children, and not the executors, could recover the money. Under a general law which allowed a married woman to cause her husband's life to be insured "by herself, and in her own name," and a charter which provided that a policy issued on the life of a husband for the benefit of his wife should be payable to her sole use, it was held that such a policy was placed beyond the reach of the husband, and that a surrender by him was unauthorized and void.[3]

[1] Bailey v. N. E. Mut. L. Ins. Co. 3 Ins. Law Jour. 442, Supreme Ct. of Mass.

[2] 7 Robert. 155. [3] Fraternal Mut. L. Ins. Co. v. Applegate, 7 Ohio State, 292.

§ 339. **Where Policy wrongfully Surrendered Rights of Beneficiary attach to Substituted Policy.**—In a case in Connecticut,[1] it appeared that a policy on the husband's life had been issued to the wife, payable to her, or in case of her death before her husband, payable to her children. She died before the husband, and he, after her death, surrendered the policy, and took out another for the same amount, but for his own sole benefit. The new policy was dated back so as to bear the same date as the original one, was for the same premium, and bore the same number. The husband paid a year's premium, and then died insolvent, and in a contest between his creditors and the children, it was held that in equity the latter were entitled to the insurance money. The court say: "It is not claimed, that the husband had any power to destroy the vested interest of the children by surrendering up the policy to the company after the death of his wife, but that, as he was under no obligation to go on paying the premiums in order to prevent a forfeiture, he became liable to the children on surrendering it, and taking a new policy for his own benefit, only for the cash value of the policy at the time, and that that cash value, with perhaps interest upon it, is all that is now equitably due to the children out of the avails of the new policy that he took in his own name, and for his own benefit. It may be true that as guardian of the children he might have had power to sell the policy to the company for the benefit of the children, and hold himself accountable to them for the avails. But he did not assume or attempt to do this. His object rather was to deprive the children of any benefit they were entitled to under or by reason of it, and to take the benefit wholly to himself in the shape of a new policy of the same tenor and date as the former one, and like it in all respects, except that his own name, as sole payee, for whose use alone the new policy appears on its face to be issued, is substituted for that of his wife and children. It was an attempt, therefore, to

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[1] Chapin v. Fellowes, 36 Conn. 132.

renew the old policy for his own benefit, making it what it would have been, had it, in fact, been so issued at the time the policy was so made to his wife; and he, therefore, instead of holding the cash value of the policy for the benefit of his children, undertook to destroy their whole interest in it, and take it to himself. The cash value of the children's interest, therefore, went into and became the consideration upon which the new policy was issued to himself. They, therefore, may well be held to have paid for the new policy, and the premiums thereafter paid upon it were precisely what would have been paid upon the policy to his wife, had that been kept alive. The obvious object of the transaction was, therefore, to retain the old policy as a subsisting operative instrument, with the substitution of his own name as payee for that of his wife and children. But he had no power to make any such substitution, and we think a court of equity ought to treat the substituted policy as, in fact, belonging to the children, and the premiums paid upon it as paid under those provisions of the charter and of the statute which authorize a husband to insure his own life for the benefit of his wife and children."

In Lemon v. Phœnix Mutual Life Insurance Co.,[1] it appeared that one Peterson, was insured by the defendants in January, 1868, for $3,000, payable to his estate at his death, provided he died before reaching the age of fifty, but to himself upon his arriving at that age; afterwards, in the same year, Peterson entered into an engagement of marriage with the petitioner, Miss Lemon, and the engagement continued at the time of his death, in 1869; in November, 1868, he had the old policy canceled and a new one issued for the same amount, payable, in case of the death of the insured, to the petitioner, and sent the new one to the petitioner's brother. A month later he procured the policy from Mr. Lemon, without fraud but without petitioner's consent, and in January, 1869, without her knowledge surrendered this

[1] 38 Conn. 294; s. c. 1 Ins. Law Jour. 520.

policy, No. 2, and took a new one, No. 3, in its place, payable to his brother. His health was not then such that he could have passed the necessary examinations, and he had before the actual surrender gone south for his health. The court say, "It is not claimed that the mere fact of making the policy payable to Miss Lemon, without more, vested in her a complete title. It is conceded that so long as Mr. Peterson retained it in his own possession he might control it as his own. On the other hand it is not doubted, but that if Mr. Peterson delivered it to Miss Lemon as a gift to her, such delivery would vest in her a complete title. The difficulty in the case is in determining whether on the facts found the policy may properly be regarded as having been in legal effect delivered to her. * * 1st. The fact that Mr. Peterson caused the policy to be made payable to Miss Lemon indicated a settled purpose in his mind that she should have the benefit of it, and his acts immediately after will naturally be construed as intended to carry out such purpose. 2d. When, therefore, the policy is, by Mr. Peterson's order, sent to Miss Lemon's brother, we naturally regard it as sent to him *for her*, as depositary for her, and for her benefit, rather than as depositary for Mr. Peterson himself. 3d. It appears that the intended change in the policy for her benefit was communicated to her before it was made, and that it was upon her suggestion that the policy was placed in the hands of her brother. 4th. After the policy was changed, and made payable to Miss Lemon, and sent to her brother, she was informed by Mr. Peterson of what he had done. Upon these considerations, in view of all the facts in the case, we think we must find that there was an executed gift of the policy to Miss Lemon, and that the delivery to her brother was as depositary for her. * *. It is clear that the consideration for policy No. 3 was the surrender of policy No. 2. Mr. Peterson's health was such that No. 3 would not have been issued if the defendant had not been bound by No. 2, and inasmuch as policy No. 2 belonged to the petitioner, it was her property, that, without her consent, was used to pro-

cure No. 3. She is therefore equitably entitled to the benefit of this policy."

In a recent case a policy was obtained by a husband for the benefit of his wife, was indorsed by her in blank, and a loan was obtained thereon by the husband. Apparently by collusion between the latter and the agent of the company, the policy was permitted to lapse by the non-payment of the premium, the creditor being quieted by the assurances of the agent, and then a new policy was issued to the wife, its terms being the same as in the first one, and the portion of the premium which was paid on the first being applied upon the second. It was held[1] that the creditor's lien attached to the fund under the second policy in the same manner that he had held it under the first.

§ 340. **Assignments by Married Women.**—With reference to assignments by married women of policies issued under statutes for their sole benefit, it is held in New York that the wife cannot, by any act of hers, alienate even her own interest in the policy during her husband's lifetime. The court say:[2] "We think the intent of the statute was to make these policies a security to the family of any married man, and a provision for their use and benefit, and that this intent would be defeated if they were held to be assignable by the wife like ordinary choses in action belonging to her in her own right as her separate property." And again, "By the common law, a person could insure his own life for any sum for which he might choose to pay the premium, and which the insurers would engage to insure; but if one desired to insure the life of another, he could only insure the interest which he had in such other life. If he undertook to insure a gross sum, and the contract was not susceptible of a construction which would limit the recovery to the actual

[1] Norwood v. Guerdon, MSS. Supreme Court of Ill.

[2] Eadie v. Slimmon, 26 N. Y. 9. It may be observed that the original papers show that the children were also named in the policy in this case, though no reference is made to that fact in the case as reported. As to this case, see Burroughs v. State Mut. L. Ass. Co. 97 Mass. 359; Kerman v. Howard, 23 Wisc. 108.

damages sustained, the contract would be void under the statutes against betting and gaming. This principle the legislature, by the act of 1840, relaxed in respect to insurance as effected by a married woman, for any sum which she and the insurance company might see fit to contract for. It was provided that in the case of her surviving her husband, the amount payable by the terms of the policy should be payable to her for her own use, free from all claims of the representatives of her husband or of his creditors. There is another feature in the act which shows that it was an enabling and not a declaratory provision. By the general rules of law a policy on the life of one sustaining only a domestic relationship to the insured, would become inoperative by the death of such insured in the lifetime of *cestui que vie;* or if it could be considered as existing for any purpose after that event, it would be for the benefit of the personal representatives of the insured; but by this act the contract may be continued in favor of the children of the insured wife after her death. These features distinguish this case from that of an ordinary chose in action belonging to a married woman as her separate estate. The provision is special and peculiar, and looks to a provision for a state of widowhood, and for orphan children; and it would be a violation of the spirit of the provision to hold that a wife, insured under this act, could sell or traffic with her policy as though it were realized personal property or an ordinary security for money." In another case in the same State, where a married woman made a contract to insure her husband's life, payable to her, her executors, administrators and assigns, and the wife died before her husband, leaving two children, it was held [1] in an action brought by the administrator of the wife against the husband's representatives, that the life insurance acts did not contemplate this description of property as a "chose in action," but as a provision looking to a state of widowhood or orphanage, and that the administrator of the wife was entitled to re-

[1] Secor v. Dalton, not reported, Supreme Court of N. Y. per Leonard, Referee, late Judge of Commission of Appeals.

cover the money, charged with a trust to pay it to the children of the wife. In Barry v. Equitable Assurance Society,[1] the policy on a husband's life, was payable to his wife in case she survived him, and if she did not so survive, then to their children, and it was held that even if the act giving a married woman power over her "separate property," could apply to a life policy, in this case her interest in the policy was not property, but only a contingent interest, and was therefore not affected by that act. In a subsequent case decided by the same judge, it was claimed that an assignment made by a married woman, was invalid under the decision in Eadie v. Slimmon,[2] but the court drew a distinction saying: "It seems to me therefore evident, that a policy may be issued to the wife upon the life of her husband in two forms; one under the act of 1840, the premiums upon which the husband may pay, to the extent allowed by statute, without subjecting it to the claims of creditors, and which must be made payable to the children, in case of the death of the wife during the life of her husband, and which is to be looked upon as a provision made by the husband for his family in case of his death, and which is therefore unassignable, it being in the nature of a trust and irrevocable. And the other, under the general authority conferred by the acts of 1848 and 1849, to make contracts for herself, over which policy she has complete control, and which is not protected from the claims of the creditors of the husband, in case he is insolvent during the time that he pays the premiums. Such a policy she can devise by will, or assign, or dispose of, in any manner which she sees fit. She may make such a policy payable to whom she pleases in case of her death before her husband. To such a policy the reasoning of the cases of Eadie v. Slimmons, and Barry v. The Equitable Life Insurance Company, does not apply, it being a contract called into being under entirely different circumstances, and for different purposes from

[1] N. Y. Supreme Court, *per* Van Brunt, J., not reported.

[2] N. Y. Supreme Court, *per* Van Brunt, J., MSS.

those which attended the issuance of a policy, under the act of 1840." It is also held, that in the absence of evidence on the face of the policy, or otherwise, that it was issued under the statute of 1840, it is presumed to have been reissued in pursuance of her general power to contract, and therefore her power to assign it was not limited. If the husband insures his life for his wife's benefit, making the policy payable to her and she accepts it, there is a sufficient ratification to make a valid insurance under the statute.[1]

§ 341. It is difficult to perceive how, by any sound reasoning, when a married woman is allowed by express statutes to deal with her separate property as if she were a single woman, as is the case in New York, there can be extracted from a statute which contains no such limitation an exception of a life insurance policy from this power of disposition. The views expressed in Eadie v. Slimmon seem not to have been directly adopted in any other State, though noticed in several. In Connecticut, the court say,[2] "That such should be the law applicable to a policy, the premiums on which were paid by the husband, certainly seems reasonable and just, while on the other hand, if the wife paid the premiums from her own separate estate, it is difficult to suggest a reason why she should not have the same power to assign her interest in the policy that she has to assign any other chose in action belonging to her." In Illinois it has been held that a married woman could make a valid assignment of a policy on her husband's life. In Pomeroy v. Manhattan Life Insurance Co.,[3] a policy had been issued upon the life of a husband for the benefit of his wife, and the latter subsequently assigned to a third person a portion of the money to become due. After the death she repudiated this assignment and claimed the whole amount, and the company interpleaded the claimants. The court in deciding the case say: "While this is not such an instrument as can be assigned at the com-

[1] Thompson v. Am. F. L. & Sav. Ins. Co. 46 N. Y. 675.

[2] Conn. Mut. L. Ins. Co. v. Burroughs, 34 Conn. 305.

[3] 40 Ill. 398.

mon law, or under our statute, so as to pass the legal title to the instrument or the money, and while an assignment of a part of the money due on any instrument does not transfer the legal title, it is such an equitable assignment as will be protected and enforced in equity. The assignment of a portion of the money specified in this instrument was valid in equity, if a married woman has the power to assign and transfer her sole and separate property and choses in action. This case mainly depends upon this question, as the fact that appellant executed the assignment is not seriously questioned. The policy declares in terms that it is assignable. It provides for the payment of the money to the assured or to her assigns. So far, then, from such an instrument being prohibited, it is authorized by the terms of the policy. Nor can it be doubted that it was the sole and separate property of Mrs. Pomeroy. And under the law she would have the power to pledge it as a security for the debt of her husband. Unless restrained by the deed, or a marriage settlement, under which a married woman holds her separate property, she may pledge or dispose of it in equity independent of the statute. This policy being the sole and separate property of the wife, she is bound in equity by this assignment." The court further holds that under a general statute of Illinois it was her separate property, which she could assign.[1] The same court has very recently reaffirmed this doctrine in a case where a policy had been assigned to the wife and she had written her name on it in blank, and the husband had thereupon used it as a security on which to raise money.[2]

§ 342. In most of the decided cases of assignment by married women the question presented has been, not whether the wife had the power to pass her own interest, but whether she could in any way affect the interest of the children. Some of the Massachusetts cases, moreover, presented the question as to who could maintain the action,

[1] In Emerich v. Cookley, 4 Chicago Leg. News, 465, the Court of Appeals of Maryland approve this case and dissent from Eadie v. Slimmon.

[2] Norwood v. Guerdon, MSS.

rather than who was entitled to the money. In Burroughs v. State Mutual Life Assurance Co.,[1] the policy insured the husband "for the use of his wife and his children alive at his decease," and the agreement was to pay "to the assured, his executors, administrators and assigns" "for the purposes aforesaid." The husband and wife subsequently assigned the policy to a third party, to secure money lent to the husband, and the assignment was assented to by the company. The husband survived his wife, but died leaving a child. The assignee, after the assignment, paid the premiums, and after the death of the insured brought his action against the company to recover the sum named in the policy. The court held that he could maintain the action, though the child might recover the money of him. The court say that "the defendants rely on the statute providing that 'any policy of insurance made by any insurance company on the life of any person, expressed to be for the benefit of a married woman, whether the same be effected by herself or by her husband, or by any other person in her behalf, shall inure to her separate use and benefit and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives; and a trustee or trustees may be appointed by any court authorized to appoint trustees, to hold and manage the interest of any married woman in any such policy or the proceeds thereof.' The Superior Court ruled that this action could not be maintained by the plaintiff. But this court is of opinion that the ruling was erroneous, and that the rights of the child of the assured by virtue of the statute cannot be set up to defeat this action. No trustee has ever been appointed to hold and manage the interest of the wife. The policies are in terms payable to the assured and his assigns. The assignments to the plaintiff, assented to by the insurers, transferred to him the legal title in the policies, and the right to sue thereon. If the assured had afterwards died, leaving no wife or child

[1] 97 Mass. 359.

surviving, the assignments would have entitled the assignee to receive the whole amount of the policies to his own use. The plaintiff, having the legal title, may maintain this action at law, and, if he recovers judgment, will hold the proceeds, so far as they inure to the benefit of the child of the assured, in trust for him. The equitable rights of the child under the statute, and the extent to which they may be subject to a claim of the assignee for reimbursement of the sums paid by him for premiums and assessments, or otherwise, cannot now be determined, but may be ascertained upon a bill of interpleader filed by the insurance company, or in a suit by the child against this plaintiff after he shall have recovered judgment in this action."

§ 343. In Knickerbocker Life Insurance Company v. Weitz,[1] the wife had effected a policy on her husband's life. Two days after the issue of the policy, the wife, with the consent of the husband, assigned the policy to secure a debt due from the husband, the assignment containing a clause to the effect that "the restrictions" in the policy should remain in force. The policy was expressed to be for her benefit, and payable, when due, to her and her executors, administrators, or assigns; but if she should die before him, then, upon his death within the term insured, "to her children by him, for their sole use, or to their guardian, if under age." She did die before him, leaving one child; and the husband died before the expiration of the term for which his life was insured. The court say: "It does not appear, and is unimportant, whether this contract was made in Massachusetts or in New York; for the laws in force at the time in the two States did not materially differ, so far as this case is concerned. If the policy is to be governed by our laws, then, by the general statutes, being expressed to be for the benefit of a married woman, it inured not merely 'to her separate use and benefit,' but 'to that of her children, independently of her husband or his creditors, or the person ef-

[1] 99 Mass. 157.

fecting the same or his creditors.' As the wife, in this case, was the person who effected the same, she could no more revoke or assign away the rights of her children in the policy, than her husband, if he had effected the policy, could have varied or defeated their rights therein, which, as has been adjudged, he could not do. By the statute of New York, any married woman may obtain insurance upon the life of her husband, payable, in case of her surviving the term of insurance, to her and for her own use, free from any claims of his representatives or creditors; and the policy may be made payable, in case of her death meanwhile, to her husband, or to his, her, or their children (as shall be, and in this case has been, provided in the policy), and to their guardian, if they are under age. The assignment of the policy by the wife contains an express recognition that 'the restrictions in said policy shall remain in full force, notwithstanding this assignment.' It is unnecessary to decide whether the word 'restrictions,' as here used, would have included the clause providing for payment to the children in a certain contingency, if that clause could otherwise have been defeated by the wife; for we are of opinion that her assignment could not defeat the rights secured to the child, by the terms of the policy, in the manner authorized by either statute. If the assignment of the wife passed anything, it was, at most, her own interest, which ended with her death. She having died before the termination of the policy, and her husband having also died within the term, the policy, by its express provisions, was not payable to her representatives or assigns, but to the child or his guardian; and the latter, therefore, and not her assignee, is entitled to receive the amount."

§ 344. In Connecticut Mutual Life Insurance Co. v. Burroughs,[1] it appeared that, in 1850, the plaintiff issued a policy of insurance on the life of George Kendall, for the sum of five thousand dollars, payable to his wife, Mary E. Kendall,

[1] 34 Conn. 305.

"her executors, administrators, or assigns, for her sole use." The policy then provided as follows: "And in case of the death of the said Mary E. Kendall before the decease of the said George Kendall, the amount of said insurance shall be payable, after her death, to her children for their use, or to their guardians, if under age," &c. In 1862, Mary E. Kendall executed a paper, purporting to be an absolute assignment of the policy to Jarvis F. Burroughs. She died on the 6th day of October, 1864, and her husband died on the 10th day of the same month, leaving one son. The insurance money was claimed by the assignee on the one hand, and by the son of the assured on the other. "The claim of the assignee," the court say, "must depend upon the validity of the assignment; for if the assignor, at the time of the assignment, had no assignable interest in the policy, or if she had an assignable interest which was contingent merely, and that interest has been defeated by the happening of her death before that of her husband, it seems quite clear that the assignee has no valid claim to the fund in question." After referring to Eadie v. Slimmon,[1] as decisive of the case before them, if followed, the court continue: "But in one respect that case is distinguishable from this. There the contingent interest of the wife became absolute by the death of the husband during her life; here that interest was defeated by her death during the lifetime of the husband. This distinction renders it unnecessary for us to determine the principal question involved in that case. For if it be conceded on the one hand that Mrs. Kendall had an assignable interest in the policy in question, it must be conceded on the other hand that that interest was a contingent one, and that the contingency upon which it was to become absolute never has happened, and never can happen. By a reference to the policy, it will be seen that it was payable to her only in case she survived her husband; and in case her husband survived her, it is expressly provided that the policy shall be payable

[1] 26 N. Y. 9.

to the children. By the terms of the policy, the mother's interest ceased, and the child's interest, which before was contingent, became fixed and certain by the death of the mother before that of the father. Unless, therefore, the assignee took a greater interest than the assignor had in the policy, the rights of the assignee terminated on the death of the assignor. But it is suggested that the clause in the policy, making it payable to the children, 'is simply the indication of her purpose, at that time, to give the sum specified in the policy to them in case she deceased before her husband;' and again, that 'it must be held to be, on her part, an expressed but unexecuted intention to give this sum to the children,' which purpose she could abandon at pleasure, and make a different disposition of the fund. This argument is ingenious, but not sound. The intention was not to give a sum of money to these children, but to make a life policy, in a certain event, payable to them. The intention was not only expressed, but executed. The contract was complete, and the money, when due, was payable to the children, without any further act on her part. But we do not regard the transaction as a gift. The charter of the company and the statute law required the policy to be made as it was, in order to protect it from the claims of creditors and the representatives of the husband. The object of the legislature was to authorize a reasonable provision to be made for the family of the husband; for the widow, if living, if not, for the children. Mrs. Kendall, when she purchased this policy, undoubtedly intended to secure the benefits of this statute not only for herself, in case she survived her husband, but for her children in case she did not, and to that end caused the policy to be made payable according to the requirements of the statute. Having done so, and the contract relations between the company and the children having thereby become fixed, it was not in her power to defeat the purpose of the legislature in respect to the children, and the manifest intention of the parties to the contract, by an assignment of the policy during the life of the husband. In addition to this it

may be observed that there was at least a moral obligation resting upon her to make this provision for her children. In doing so we must regard her, not as indicating a purpose to bestow a gift, but as discharging a moral, if not a legal, duty. Nor is there any force in the suggestion that the instrument is testamentary in its nature, and therefore revocable. It is not a will, but a contract, authorized and regulated by statute; and when once entered into, it is no more revocable than a promissory note would be, which was made payable to the children after the death of the mother. But it seems that the assignee paid one premium on this policy amounting to $109 74. We think it equitable that the money thus paid should be refunded. The Superior Court is, therefore, advised that the assignee is entitled to the sum paid for premium, together with interest thereon from the date of payment, and that the balance of the fund should be paid over to the guardian of the son."[1]

§ 345. **Consequences of the Rule Confining Power of Assignment or Surrender to the Beneficiary.**—It will be perceived that in all these cases the principle is maintained that no person, other than the persons designated in the policy, can assign or surrender it, and that in such assignment or surrender all the persons must concur, or the interest of those not concurring is not affected. Attention has already been called to the fact that, under a strict reading of the Massachusetts statute, it would seem that children are necessarily, and whether named in the policy or not, by force of the statute, interested in every policy issued for the benefit of a married woman. If this is so, no policy can in that State be surrendered or assigned without the concurrence of the children.[2] Without meaning to question the soundness of the legal principles upon which the cases already referred to were decided, it seems proper to make one or two observations. While the person who procured the policy, or any number of the nominees named in it cannot surrender or

[1] See Chapin v. Fellowes, 36 Conn. 132.

[2] *Ante*, § 25, note 1.

assign it so as to bind the others, it is equally clear that they are not bound to continue to pay or to contribute to the payment of the premium. They have it, therefore, practically in their power to forfeit the policy, so that no one will derive any benefit from it. Cases have arisen in which a husband, being unable to continue to pay the premiums on a policy issued for the benefit of his wife and children, has desired, with the concurrence of his wife, to surrender it to the company, and to receive, in accordance with its provisions, a "full-paid policy," that is, one on which no more premiums are to be paid. Such a policy is, of course, for a much less amount than one on which annual premiums are payable. The company, however, cannot safely accept the surrender of the old policy, and issue the new one, without the concurrence of the children. They are frequently infants, and there is a doubt whether they, or any one for them,[1] can legally concur in such a surrender, and yet it is obviously for their benefit, as presenting the only way in which they can get anything from the company. Moreover, nice questions arise on the meaning of the policy. It is rarely clear what children are meant, whether children in existence at the time of the issue of the policy, or those in being at the death of the insured. If the latter is the meaning, it will be impossible to make any such surrender, because there is no way of binding children born subsequent to the assignment or surrender, unless, indeed, there may be applied in some cases the rules as to the probability of issue, which the English courts have established in dealing with life estates.[2] And again, a ques-

[1] But see Chapin v. Fellowes, 36 Conn. 132.

[2] Bunyon says (page 105): "It may, however, be convenient to cite some cases in which the courts have presumed that women have been past child-bearing at particular ages. In Leng v. Hodges (Jac. 585), the presumption was raised at 69, the money being paid out of court on the party's own recognizance to refund in the event of children being born. In Fraser v. Fraser (Jac. 586, note), the same course was taken when the age of the woman was 55. In Lyddon v. Ellison (19 Beav. 565), at 56. In Miles v. Knight (12 Jur. 666), at 68. In Brown v. Pringle (4 Hare, 124), the presumption was raised at 66. In Dodd v. Wake (5 De Gex & S. 226), at 65. In Brandon v. Woodthorpe (10 Beav. 463), at 63. On the other hand, *In re* Overhill's Trusts, 17 Jur. 342 (V. C. S.), is an authority that the court will not presume that a married woman, aged 49, cannot have

tion may arise on the language of the policy as to whether, if the mother is alive at the death of the insured, she is entitled to the whole of the money, or if she is to share it with the children, and if so, with what children. These are questions which are likely to arise constantly, which have in practice given to the companies much difficulty, though they seem not to have been the subject of any reported judicial decisions, but the recent case of Chapin v. Fellowes,[1] save in the motive of the surrender, seems applicable. In Greenfield v. Massachusetts Mutual Life Insurance Co.,[2] the action was upon two policies, both upon the life of John Greenfield. One of them was for $3,000, "two thousand dollars of said sum insured being for the express benefit of Jane, the wife, and one thousand dollars for Agnes, the mother of said assured." The other policy was issued after the first wife, Jane, named in the first policy, had died, and the insured had married a second wife, named Fanny. That policy was for $3,000, "one thousand dollars of said sum insured being for the express benefit of the mother of said assured, and two thousand dollars for his wife and their children." The insured died, leaving surviving him his mother, his second wife, Fanny, and his children by the first wife. He left no children by his second wife, but she had a child by a former husband, and there was also an illegitimate child of the insured. It was substantially admitted that, as to the amount insured by the first policy, the mother was entitled to one-third, and the children, by the first wife, to two-thirds, they taking as heirs of their mother, the first wife. As to the second policy, it was held that the mother took one-third, while, of the remaining two-thirds, the second wife took one of the thirds,

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children; and, by a great authority, it is stated as a fact, that a woman aged 60 bore a child. (Co. Lit. 40 b.) * * * There is scarcely any age at which the presumption arises that a man becomes incapable of begetting children. In Trevor v. Trevor (2 My. & K. 675), it seems to have been thought that there was no such presumption at the age of 80; nor in Lushington v. Boldero (15 Beav. 1), at 95.

[1] 36 Conn. 132.

[2] Not reported; Supreme Court, New York, reversed by Court of Appeals on another point, 47 N. Y. 430.

and the other third was divided between the children by the first wife and the child of the second wife, each child taking an equal sum. It will be perceived that there was no person who strictly answered to the language of the second policy, "*their* children," but it was substantially interpreted to mean the children of either of them.[1]

§ 346. **Attempts to Avoid the Effect of the Rule.**—Some of the companies have sought to avoid the difficulties we have suggested by agreeing with the father or mother that, if they will let the policy lapse by non-payment of the premium, the company will then, as a favor, and not as a right, after the lapse, issue a paid-up policy, and this has been supposed to cut off the claims of the children. If there is a provision for such an arrangement in the original policy, it would doubtless be legal and effectual. But the case of Chapin v. Fellowes, already referred to,[2] seems to show that there are, to say the least, doubts as to the legality of such a procedure. Indeed, it seems open to the objections urged by Mr. Bunyon,[3] who says, "Specious arguments may be urged in favor

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[1] The State of New York passed an act in 1873, chapter 821, by which it was sought to remove these difficulties. It provides that, "Any policy in favor of a married woman, or of her or her children, or assigned in her, or in her and their favor, on written request of said married woman, duly acknowledged before a commissioner of deeds, or other officer authorized to take acknowledgments of deeds, in the same manner as required by law to pass her dower right in lands of her husband, and on the written request of the policy holder, may be surrendered to and purchased by the company issuing the same in the same manner as any other policy. And such married woman may, in case she have no child or children born of her body, or any issue of any child or children born of her body, dispose of such policy in and by a last will and testament, or any instrument in the nature of a last will and testament, or by deed duly executed and acknowledged before an officer authorized to take acknowledgments of deeds, in the same manner as required by law to pass her dower right in lands of her husband, which disposition lawfully made shall invest the person or persons to whom such policy shall have been so bequeathed or granted and conveyed, with the same rights in respect thereto as such married woman would have had in case she survived the person on whose life such policy was issued, and such legatee or grantee shall have the same right to dispose of such policy as herein conferred on such married woman." But the act is so badly drawn that it is extremely doubtful whether it has accomplished the result intended. So far as it seeks to authorize the interest of children to be affected by the acts of the mother, it can clearly not constitutionally apply to policies issued before its passage. If the term "policy holder" is to be construed as referring to all persons interested under the policy, the effect of the statute will be very limited.

[2] 36 Conn. 132.

[3] P. 302.

of such a step, but it is one which the company can rarely be advised to take; the new policy, if granted to any one of the parties interested in the old one, would probably, by an application of the doctrine of the court as to the trusts of renewed leasehold estates, be considered subject to the like claims and equities as the former policy, of which in fact it would be a revival.[1] The arrangement itself might be considered as tainted with legal, if not with moral, fraud, and the company might be liable in respect to any claims of which it had notice; and the very transaction itself might be considered notice that there were claims. Compliance indeed with the request may give rise to claims which could not otherwise have arisen against the office, as when the policy was held by a first mortgagee, who neglected to give notice of his lien, and the duplicate policy is then deposited with a second mortgagee.[2] On the other hand, when a policy has lapsed, by mistake, or at least without agreement or tacit understanding with the company, and both the legal and equitable rights to the renewal are gone, the revival of it, or the creation of a new policy of the same value in favor of third parties, as for instance, in favor of the family of the assured, as a matter of grace or favor on the part of the company, would, in the absence of collusion, create no equity as against them, to bring the policy into assets, or to revive the lien of an incumbrancer upon the old policy. The re-grant would operate in favor of those parties whom it was intended to benefit."[3]

§ 347. A Different View taken in some States.—Impressed,

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[1] Fitzgibbon v. Scanlan, 1 Dow. 261; Tanner v. Elworthy, 4 Beav. 487. See Winthrop v. Murray, 14 Jur. 302; Nesbitt v. Berridge, 10 Jur. N. S. 53.

[2] Le Feuvre v. Sullivan, 10 Moore, P. C. C. 1.

[3] Morton v. Tewart, 2 Y. & C. C. C. 67. It would seem that in the case of Whitridge v. Brune, 3 Ins. Law Jour. 80, some of the difficulties suggested have arisen. After an assignment of policies had been made, in order to avoid the effect of the decision in Eadie v. Slimmon, 26 N. Y. 9, they were, by consent of the company, allowed to lapse, and new ones were issued to the assignee directly. The U. S. Circuit Court for Maryland held that an action could be maintained on these policies, without reference to the first ones upon which an action was also pending in New York. The case of Barry v. Mut. L. Ins. Co. 3 Ins. Law Jour. 74, is the New York case referred to.

doubtless, with the force of difficulties such as we have suggested, the courts of Wisconsin have avoided them by holding that the person procuring the policy may dispose of it without the consent of his nominee. Such a view certainly avoids many difficulties, but is hardly consistent with legal principles. In Kerman v. Howard,[1] it was held that where a husband had effected an insurance upon his life for the benefit of his wife or his legal representatives, had deposited it with a third party and paid the premiums, he, having survived his wife, could dispose of the policy by will in such manner as he saw fit. The court say: "On the part of the infant plaintiff it is contended, that where a husband effects an insurance on his own life, for the benefit of his wife, and himself pays the premiums, since the insurance is effected for the benefit of a married woman, the husband, though he survives the wife, has no power or authority whatever over the policy, but that it goes to her children like her separate estate. This position, it is claimed, is sustained by section 5, chapter 95, R. S. That section reads as follows: 'Any policy of insurance made by any insurance company on the life of any person, expressed to be for the benefit of a married woman, whether the same be effected by such married woman, or by her husband, or by any other person on her behalf, shall inure to her sole and separate use and benefit, and that of her children, if any, independently of her husband, and of his creditors and representatives, and also independently of any other person effecting the same in her behalf, his creditors and representatives: and in case of the death of the husband of such married woman, such policy and the benefit thereof shall not go to his executors or administrators, but shall belong to such married woman, and shall be for her sole use and benefit and that of her children.' The language of this statute is somewhat peculiar, but still we think it is not difficult of construction. In the first place, we suppose it enables the husband to effect a policy of insurance on his

[1] 23 Wisc. 108.

own life for the benefit of his wife, which, in case she survives him, goes to her, free from his creditors and representatives. It also makes it lawful for a married woman herself, and for her own benefit, to effect an insurance on the life of her husband or any third person, which shall belong to her and her children. * * This statute has authorized a married woman to insure for her benefit the life of any person. And, besides, it is obvious that a third person might insure his own life, or insure the life of the husband, for the benefit of the married woman. In these cases, and perhaps in others embraced within the statute, the married woman has the benefit of the policy independently of her husband and his creditors. But when the husband effects a policy on his own life for the benefit of his wife, pays the premiums, and survives her, we do not think the statute intended to deprive him of all power over the policy. Suppose he wished to change the policy in favor of some other person, could he not do it with the consent of the company? He might wish to use or assign the policy as a means of credit or security. He might not wish to continue the payments by which the policy was kept alive, and thus abandon the policy altogether. Would he not have the right to discontinue payment of the premiums, and let the policy lapse? It seems to us that he would, or that he might bequeath or assign the beneficial interest in the policy as he might think proper. This right to dispose of the policy he would have in the absence of the statute, and we do not think the legislature intended to deprive him of it by that provision." In the earlier case of Clark v. Durand,[1] a mother insured her life for the benefit of her son, the policy being made in the name of a third person as his guardian. This guardian loaned the mother the money to pay the first premium, and himself paid several succeeding premiums. The mother subsequently told the guardian she could not keep the policy up, and was about to abandon it, but that he, the guardian, might have it, if he would release her from the pay-

[1] 12 Wisc. 228.

ment of the back premiums and keep the policy alive. The guardian took the policy, and paid the premiums till the mother died, when he received its proceeds from the insurance company, receipting for them as guardian of the son. On this state of facts, it was held, in an action brought by the son against the guardian, that the policy was validly assigned to the guardian personally, and that the son had no claim for the proceeds. The court say, "This action was commenced, and if maintainable at all, can only be maintained upon the theory that the plaintiff, as the *cestui que trust*, or party beneficially interested, acquired, during the lifetime of Mrs. Clark, an actual equitable interest in the policy and the moneys thereby secured and agreed to be paid on her death. She effected the insurance on her own life. The policy sprang from an agreement to which she and the insurance company were the real parties; and although the defendant, as the guardian of the plaintiff, was nominally the assured, yet during her life, and until she transferred it, she was the only person having any direct pecuniary interest in it. She received, and, until the transfer and delivery to the defendant, held it in her possession, and with her own funds, or those procured by her from the defendant, paid the quarterly premiums, as they became due upon it. The true criterion by which to determine whether the plaintiff had any interest in the moneys received upon the policy, would seem to be, whether, during her life, he had such an interest in it as would have enabled him to compel Mrs. Clark, or the defendant, as nominal trustee, to keep up the premiums, upon the prompt payment of which its validity and value depended, or as would have enabled him to restrain or prevent her and the defendant from entering into and consummating the bargain which they did in relation to it. It is very evident that he was no party to the policy, or the agreement by which it was procured. The only parties, real and nominal, were the defendant, Mrs. Clark, and the company. He furnished no part of the consideration upon which the policy was issued. If it was her intention, at the time she procured

it, as it undoubtedly was, to have the money due upon it at her decease paid over to him, or applied to his benefit, yet she was under no obligation, legal or equitable, to obtain it, or to keep it up after it was obtained. Neither she nor the defendant had made any contract or agreement with him, upon a valuable consideration or otherwise, to procure or to keep up such insurance. So far as he was concerned, it was a mere proposed gratuity or gift, a voluntary thing, which they were in no way bound to do, and which they might do or cease to do, as best suited their convenience or pleasure. He was a mere volunteer, not having any present beneficial interest, but who, it was intended at one time, should, on the happening of many contingencies, be so interested on some future occasion. He had no vested right in the policy or moneys secured by it, and could have none until after the death of Mrs. Clark, he surviving her; and then only in the event of the contract and the intention of the parties remaining the same, and of her, or of some other person in his behalf, having kept up the premiums. If it was a trust in his behalf, or by which it was intended that he should be benefited, it was executory and not executed; and it is well settled that courts will not interfere to enforce an executory trust at the instance of a volunteer. It seems quite clear, therefore, that, during the lifetime of Mrs. Clark, the plaintiff could neither have compelled the payment of the premiums, nor have prevented her from passing the policy over absolutely to the defendant. Considering the policy, as it was in fact, an executory contract between the company and Mrs. Clark, and the defendant consenting to act as trustee, no reason can be perceived why it was not, like every other executory agreement, subject to such disposition, changes, and modifications as the several parties to it might see fit or consent to make, and why Mrs. Clark, having changed her mind in regard to bestowing upon the plaintiff the benefits expected from it, or feeling herself unable to meet the premiums, might not, with the assent of the company, transfer it to the defendant, to be held

by him for his sole use and benefit, he agreeing to pay the premiums." In a New Jersey case, a policy of insurance was taken by a wife on the life of her husband, in favor of, and made payable to, her children. After the payment of several premiums she assigned this policy in payment of a debt of her husband, and thereupon the assignee paid several successive premiums. After the death of the husband the children filed their bill, claiming the whole sum insured, but it was held by the chancellor that they were entitled only to the value of the policy at the time of its assignment, on the ground that the gift from the mother to them was executed only to that extent, and this decision was affirmed on appeal,[1] the court saying: "By taking the policy in its form payable to the appellants, and by the payment of these premiums, the mother passed definitively to the appellants, an interest in the policy to the value of such payments. To this extent the transaction was finished and executed. But beyond this value nothing could pass to the appellants but by a further act of the mother, and which act was entirely voluntary. She had not even agreed to perform such act. Whatever premiums she might have paid beyond those actually paid, would have been entirely gratuitous. * * The point is a nice one, and it seems to me there are no precedents, for the American cases cited can have but little weight as they all rest in a great degree on statutory considerations. The chancellor's view is certainly an equitable one; it gives to the appellants the full value of the policy up to the time it ceased to be kept alive by their mother. At that point the mother indicated by the assignment of the policy her intention to make no more payments in their favor, and unless the respondent had continued to keep the policy alive it would have been forfeited with respect to all persons holding an interest in it. It is by no means certain that this assignment has not been an advantage to the appellants, as otherwise the policy might have fallen in. The respondent

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[1] Landrum v. Knowles, 22 N. J. Eq. 594.

kept this insurance alive for his own benefit, having acquired an interest in it by the payment of a valuable consideration. As the intention was clear, the mere form in which the interest was passed to the respondent cannot, in a court of equity, affect the substantial rights of the parties. The result in the court below goes upon the ground that the mother of these appellants gave to them the entire interest in this policy which she herself had paid for; that, to this extent, the the gift was executed, and, consequently, could be enforced in equity, but that the acquisition of a further interest by the payment of subsequent premiums was altogether executory and voluntary, and that such interest was not acquired by her, and cannot be claimed by her beneficiaries. As I have said, this result appears to meet fully the equity of the case, and as it also, in my judgment, is in harmony with correct theory, I shall vote to affirm the decree of the chancellor."

§ 348. Two cases in Missouri present another aspect of the same question. In one,[1] a policy on the husband's life was issued, payable to the sole and separate use of his wife. He paid the premiums and subsequently assigned the policy to a third party as security for money borrowed, his wife joining in the assignment. He died without repaying the loan, and the money was claimed both by the creditor and by the wife. In deciding the case in favor of the assignee, the court say: "With respect to reversionary choses in action and other reversionary equitable interests of the wife in personal chattels, the doctrine has been for a long time well settled, and in a manner most favorable to her rights, for no assignment by the husband, even with her consent and joining in the assignment, will exclude her right of survivorship in such cases. The assignment is not, and cannot, from the nature of the thing, amount to a reduction into possession of such reversionary interests; and her consent during the coverture to the assignment is not an act obliga-

[1] Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419; s. c. 1 Ins. Law Jour. 38.

tory upon her. But the question to be considered is whether this case falls within the above mentioned rule. If the policy was a chose in action, or an equitable interest, absolutely belonging to the wife, within the meaning of the doctrine, there could be no doubt; but the case is peculiar and distinguishable. It is an interest designed for her benefit, but the consideration immediately moves from the husband and is dependent on his action. The statute in reference to married women provides that it shall be lawful for any married woman, by herself, and in her name, or in the name of any third person with his assent as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life, and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, and for her own use, free from the claims of the representatives of her husband, or of any of his creditors; but such exemption shall not apply when the amount of the premiums annually paid shall exceed $300. The eighteenth section of the same act makes it apply to all policies, whether the same were effected by the wife herself or her husband for her benefit, either before or after the passage of the law; and provides for the inurement of the money to the separate use and benefit of the wife and her children, if any, independently of her husband and of his creditors and representatives. * * The statute, therefore, may be considered in the light of an enabling act. It enables the husband to effect a policy of insurance on his own life for the benefit of his wife, which in case she survive him, goes to her free from his creditors and representatives. It also makes it lawful for a married woman herself, and for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children. * * But it is expressly provided, that to secure the exemption or immunity on policies in favor of married women, the amount of premium annually paid shall not exceed three hundred dollars. The law did not intend that the husband

withdraw any greater amount from his means or his creditors to be expended for such a purpose. As the premium was greater in this case the policy is withdrawn from the operation of the statutes, and does not come within the provision granting it an entire and absolute exemption in favor of the wife. As a policy, not governed by the statutes, I entertain no doubt about its transferability, and the assignment having been voluntarily made by Mrs. Brant and her husband for a favorable consideration, with the assent of the company, I think it should be held valid." In the other case,[1] the plaintiff insured his life for the benefit of his wife, and subsequently the husband and wife, with the assent of the company, assigned the policy, which was then non-forfeitable, to secure an indebtedness of the husband. The plaintiff brought an action, having been appointed trustee for his wife under a statute which made such policies inure to the separate benefit of the wife and her children and authorized the court to appoint a trustee to manage the interest of the wife in the policy or its proceeds. The court held that the language of the statute, "that the policy shall inure to the separate use and benefit of the wife and her children," applies simply to the manner of the descent and distribution. After the wife has received and reduced the money to possession, and she dies, it shall go to her children, and not to her husband's representatives, and that the law gives the insurance to the wife and allows her to keep and retain it, if she chooses to do so, without molestation, but that there are no terms of restraint used, nor any provisions against voluntary alienation on her part, or against an assignment of it by the husband and wife conjointly.

§ 349. In Rison v. Wilkinson[2] it was also held under a statute somewhat different in its language, that the insured had a right to dispose of the policy. Rison effected an insurance upon his life, in June, 1847, for the term of seven

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[1] Baker v. Young, 47 Mo. 453; s. c. 1 Ins. Law Jour. 11.

[2] 3 Sneed, 565.

years. He died intestate, in February, 1854, leaving the complainants, consisting of his wife and children. In 1848 the policy was assigned to the defendants, with the assent of the agent, as collateral security for a note of $1,097 given for a bill of goods then purchased. Rison having failed, after the first year, to pay the annual premiums, the policy would have been forfeited and lost but for the acts of the defendants in discharging them at the proper times, down to the death. After the death of Rison, the defendants received, as assignees, $1,980 upon the policy, and claimed to hold not only the amount of the note, with interest, together with the amount advanced by them for premiums, but also the balance of the amount received. The complainants, on the other hand, claimed the whole amount, without paying the note of $1,097, or the premiums advanced. The bill was grounded upon the provisions of the act of 1846, which provided that "whenever any married woman may cause a life insurance to be effected upon her husband's life, the said insurance shall in no case be subject to execution or attachment for the debts of said husband, but the same shall inure to the benefit of the widow and heirs of said husband. And further, that any husband may effect a life insurance on his own life, and the same shall in all cases inure to the benefit of his widow and heirs, in the present rates of distribution, without being in any manner subject to the debts of said husband, whether by attachment, execution or otherwise." The court say: "It is contended that this act operates as a settlement upon the widow and children of the insured, and cannot be divested from their use and benefit by any act of his, or his creditors. It would be more difficult to meet this argument, if indeed it could be successfully met at all, if the policy had expressly provided that in the event of death, the sum secured should be paid to the widow and children. But this is an ordinary policy upon his life, without any special stipulations of that or any other kind. So the case is to be decided upon the construction of the act alone. Its phraseology is very strong and forcible in favor

of the rights of the widow, in exclusion of creditors. But it must have given to it a sensible construction, promotive of the intention of the legislature. Without this act the insurance money would go to the personal representative of the deceased, and constitute assets in his hands, subject to the payment of debts. Before the act, creditors would have preference over the family, but since, the latter have the exclusive claim to the particular fund. The wisdom and humanity of the law may be admitted, but surely it was not intended to divest the insured, while he lived, of the right of disposing of his own as he pleased, so as to bind those who might come after him, and stand in his shoes. This would be the effect of the construction contended for by the complainants. We think that nothing more is intended by the act, and that no other operation can be given to it, than to prevent a fund of this kind from passing into the hands of the administrator with the other effects of the insured in favor of the widow and children, or, in other words, to prefer them to creditors to that extent. But it can only apply where the claim remains undisposed of by the deceased. His power over it during his life is not at all affected by the act, but continues as ample and unrestricted as before. This method is often resorted to, as in this case, by men in slender circumstances, whose ability to pay is supposed to depend upon their personal exertions, and it cannot be supposed that the legislature intended to deprive poor men of this mode of obtaining credit, and thereby getting into business, and making a living for themselves and families. We do not feel constrained so to construe the language used in the act before us, but are of opinion that to give it such an operation would be going beyond the objects and intention of the legislature." They therefore gave the defendants the amount of the debt and the premiums paid, and the remainder to the complainants.

Where a person in 1853 obtained a policy upon his own life for the benefit of his wife or her legal representatives, but his wife having died in 1856, the husband who paid the

premiums continued to pay them until 1860, when, having married again, he procured a memorandum on the policy that it should stand for the benefit of his then wife, and he thereafter paid the premiums till his death in 1868, it was held,[1] that the policy having been originally taken out by the husband for the purpose of securing the support of the wife after his death, he was not bound to continue the policy for the benefit of her representatives, but had a right with the consent of the company to change the beneficiary. It amounted to a surrender of the old policy and the issue of a new one.

§ 350. **Right to Receive Premiums Erroneously Paid.**— Whether a person who pays premiums erroneously, supposing he has become the owner of the policy, can be allowed from the insurance money the premiums he has paid, is a matter of considerable difficulty. In Gould v. Emerson,[2] where it was held an administrator could recover the money of the company, but for the benefit of a nominee, he was allowed his expenses. In Knickerbocker Life Insurance Co. v. Weitz,[3] the question as to the premiums was suggested, but not decided. In Burroughs v. State Mutual Life Assurance Co.,[4] it was held that the question could not be decided in an action by one party against the company, but it was left to be settled in a second action. In Connecticut Mutual Life Insurance Co. v. Burroughs,[5] the assignee was allowed the premium he had paid, as was the trustee in Chapin v. Fellowes,[6] and the beneficiary named in the new policy in Lemon v. Phœnix Mutual Life Insurance Co.[7] The latter decisions seem just, where the assignee has derived and could derive no advantage from such payment, but it seems difficult to defend them on legal principles. If it is held that the assignee took the interest of his assignor subject to be defeated by the death of the insured leaving children, then the assignee could fairly be held to have paid the premium on the

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[1] Gambs v. Covenant Mut. L. Ins. Co. 50 Mo. 44; s. c. 2 Ins. Law Jour. 338.

[2] 99 Mass. 154.

[3] 99 Mass. 157.

[4] 97 Mass. 359.

[5] 34 Conn. 305.

[6] 36 Conn. 132.

[7] 38 Conn. 294; s. c. 1 Ins. Law Jour. 520.

chance that the interest might become absolute in him. If it be held that as matter of law no interest whatever passed to the assignee, then he was, in the eye of the law, a mere volunteer.[1]

§ 351. **Receipt to which Company is Entitled.**—In the case of a lost policy, a decree of a court is a sufficient protection to the company to require them to pay under it,[2] without having any right to demand any indemnity from the person to whom the money is paid.[3] Where a policy is assigned to a trustee, who either in terms or by a fair construction has a power to give a receipt, the company should pay to him.[4] Where no legal interest passes to the assignee, but the right to sue remains in the assignor, to be exercised for the benefit of the assignee, the insurers are entitled not only to a receipt, which shall be an equitable discharge, but to one which renders them secure against any exercise of the legal right to their prejudice.[5] If the policy contains, as it usually does, a provision that the sum insured will be paid on the production of the policy, it must of course be produced or its loss accounted for before payment can be required.[6]

§ 352. **Assured is Entitled to the Money, though he has Authorized the Surrender of the Policy, unless it is Actually Surrendered.**—The holder of a policy which had been in existence over five years agreed with the company to surrender it for cancellation on the return to him of his premium note then outstanding. He delivered the policy to his brother-in-law for that purpose, and the latter sent it to the company, who in return sent the notes to its agent to be surrendered. Before this was done the brother-in-law and an uncle of the

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[1] But see West v. Reid, 2 Hare, 249; Aylwin v. Witty, 30 L. J. Ch. 860; s. c. 9 W. R. 720; Burridge v. Row, 1 Y. & C. 583; Schondler v. Wace, 1 Campb. 487.

[2] Crokatt v. Ford, 25 L. J. Ch. 552; s. c. 2 Jur. N. S. 436.

[3] England v. Lord Tredegar, 1 L. R. Eq. Cas. 344; s. c. 35 Beav. 256; 35 L. J. Ch. 386. See Bunyon, 379.

[4] Curtin v. Jellicoe, 13 Irish Ch. N. S. 180.

[5] Bunyon, 375; citing Prudential Ass. Co. v. Thomas, 3 L. R. Ch. Ap. 74.

[6] Mut. Prot. Ins. Co. v. Hamilton, 5 Sneed, 269; Bunyon, 378.

insured concluded to procure the policy to be reissued for their benefit. They therefore, without the knowledge of the insured, induced the agent to send the notes back to the company, with a statement that the insured desired to renew the policy, and as his brother-in-law and uncle were to help him, he desired the renewed policy to be in their names. The company thereupon issued a new policy with the same number as the original one, and like that in every respect, except in the name of the beneficiary. The notes of the insured were paid in part by dividends and in part by the beneficiaries. On the death of the insured the amount of the policy was paid to the brother-in-law, who had purchased the interest of the uncle. The wife of the insured, as his administratrix, brought her action to recover of the brother-in-law the amount, and was held entitled thereto. The court say:[1] "The liberality of the company in thus apparently allowing a third party to insure on such exceptionally favorable terms is explained by the letter of Mr. Phelps, by which the company was induced to make the renewal or reissue. By this letter it was represented to the company that the renewal was requested by O. H. Dutton, the party equitably entitled to these benefits, and that the defendant and George D. Dutton were acting only in the capacity of his friends. Justice to the defendant requires that it should be clearly stated that there is nothing in the case which would warrant even an intimation that he had actual knowledge of the contents of this letter. If he had had such knowledge, and subsequently accepted the reissued policy, the case would have been too clear for discussion, and it cannot be presumed that he would have laid claim to the proceeds of the policy.[2] But the legal rights and liabilities of parties are often affected by the acts and representations of others of which they had no knowledge, where they have received the benefit of contracts induced by such acts or representations. In this case, it was the representations of Phelps that the renewal of the policy

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[1] Dutton v. Willner, 52 N. Y. 312.

[2] Morton v. Tewart, 2 Y. & Col. Ch. 67.

was requested in behalf of O. H. Dutton, which brought the renewal. It is not to be presumed that the company would have granted it had they not been led to suppose that O. H. Dutton desired to retract his proposition to cancel the insurance. When O. H. Dutton's notes, which had been sent to Mr. Phelps for the purpose of consummating the cancellation of the insurance, were returned to the company, it must have supposed that this was done with the consent of O. H. Dutton, and not that other parties were using these notes for their own benefit without his authority. The letter of Phelps was written in consequence of the application of G. D. Dutton to him to procure a policy. G. D. Dutton made the application on behalf of himself and the defendant. Phelps was, therefore, the agent of G. D. Dutton and the defendant to procure the policy from the company. He had no power to issue it himself. When it came they accepted it, and saw from its contents that it was a renewal or reissue of the old policy, and by accepting it they must be deemed to have adopted the instrumentalities by which it was obtained to the extent, at least, to which their right to the policy might be affected by the means employed by their agent to obtain it, even though innocent of any complicity in those means. The application of this principle leads to the result that the defendant can have no greater claim to the proceeds of the policy than he could have if he had, while acting as the agent of O. H. Dutton to procure the cancellation of the contract, obtained a renewal of it payable to himself upon the representations that he was acting as the friend of O. H. Dutton and at his request, and had used for that purpose the notes of O. H. Dutton, which he knew his principal desired cancelled.

"But, aside from the considerations growing out of the letter of Phelps, and treating the case as if the application for a reissue had been made by the defendant directly to the company without any representation that he was acting on behalf of O. H. Dutton in obtaining the renewal, then the question arises whether the defendant can, under the general

rules of law governing the relations between principal and agent, retain the benefit of this transaction. * * It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. If the agent deals with the subject-matter of his agency, or by departing from the instructions of his principal, obtains a better result than could have been obtained by following them, the principal can claim the advantages thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. The rule which places it beyond the power of the agent to profit by such transactions is founded upon considerations of policy, and is intended not merely to afford a remedy for discovered frauds, but to reach those which may be concealed, and also to prevent them, by removing from agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates. All profits and every advantage beyond lawful compensation, made by an agent, in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal. The defendant in this case admits in his answer "that O. H. Dutton requested the defendant, as his agent, to surrender the policy of insurance for cancellation, and entrusted him with the same for that purpose," and the same fact is found by the court. * * In substance the defendant, instead of cancelling the policy, renewed it without the knowledge of his principal, and had it made payable to himself and G. H. Dutton, deriving from such renewal much greater advantages than he could have derived from an original application on his own behalf for a policy on the life of O. H. Dutton, and ultimately receiving the proceeds of the renewal. It is contended that before ob-

taining the renewal or reissue, the defendant had executed the power conferred upon him by O. H. Dutton, by surrendering the original policy, that when that had been done all interest of O. H. Dutton in the matter had terminated, and the defendant was at liberty to make whatever contract he pleased with the insurance company for his own benefit. This argument is too transparent to conceal the real nature of the transaction. It is true that the defendant at one time did physically surrender the policy, and at that time, he, no doubt intended to carry out the instructions of his principal. The premium notes were thereupon sent by the company to Mr. Phelps for the purpose of being surrendered, and the defendant must have known that one of the purposes of his principal in surrendering his policy was to extinguish those notes, and that to consummate the matter they must be delivered up. But while the notes were still in the hands of Phelps uncancelled, and the matter thus capable of reconsideration, the defendant at the instigation of George D. Dutton consented to undo so much as he had previously done in pursuance of his agency, and to accept a reissue of the policy for the benefit of himself and G. D. Dutton, giving them in terms the benefit of the original policy, and consequently of the payments which O. H. Dutton had previously made thereon, and leaving his notes outstanding in the hands of the company as security for the unpaid premiums. It is plain that the new policy thus obtained was a mere substitute for a continuation of the surrendered one, and not a new and independent contract.

"If on the surrender of the original policy the company had paid a sum of money to the defendant by reason thereof, no one would question that he must account for the money to his principal, though his principal had authorized him to surrender the policy for nothing. Instead of a sum of money the company gave the defendant a contract, part of the consideration of which proceeded from his principal, and out of which the defendant has realized a considerable amount. On what principle can the agent retain this benefit with any greater show of right than he could a direct payment? The

consideration for it was in part the policy with which he had been entrusted by his principal, and in part the notes of his principal which, as he well knew, ought to have been extinguished. The fact that in addition to these the agent contributed some of his own funds, gives him no right except that of reimbursement of what he has contributed. It is said that O. H. Dutton sustained no prejudice by the renewal of the policy and the redelivery of his notes to the company, for the reason that the acceptance by the company of the surrender of the original policy, would have been a good defense to the notes. Whether or not the defense would have been available, it is not necessary to inquire. The notes being left outstanding as valid securities and consequent exposure to an action and to the necessity of defending it, would be some prejudice. The defendant took up the notes after the lapse of a year or more, availing himself of them in the mean time to obtain credit for the unpaid premiums accrued on the policy, and it hardly lies in his mouth to say that they were not valid obligations. But as before remarked it was not necessary that the principal should have been prejudiced. * * If, when it was proposed to the defendant to renew the policy for the benefit of himself and G. D. Dutton, the defendant had asked the consent of O. H. Dutton so to do and to use his notes for such purpose, and such consent had been voluntarily given, then in the absence of any misrepresentation, concealment or fraud, the defendant might have been discharged from his obligations as agent and might have acquired a beneficial interest in the policy. * * The defendant is entitled to credit for all payments necessarily made to preserve the policy. The residue he must be deemed to have received in trust for the legal representatives of O. H. Dutton, deceased."[1]

§ 353. **Rights of Creditors.**—Where a policy is by its terms assignable, the only condition being that notice shall be given to the company, and proof of interest produced with proof of

[1] As to assignments to a party who has no interest in the life, see *ante*, §§ 26, 30.

death, it may while the insured is still alive be reached and made to apply on a debt due from the owner of the policy.[1] Creditors may follow and recover a policy assigned by an insolvent debtor in trust for his wife.[2]

So the moneys received on a policy issued for her benefit, where the premium is paid by the insolvent husband, may be reached by creditors if the amount insured is in excess of the sum necessary for the reasonable support and education of herself and family.[3] In England a doubt which existed as to the right of creditors to follow a policy of life insurance, has been removed by the statute subjecting choses in action to be taken on execution.[4] So where the assignment is made by a person *in extremis*.[5] Where a policy is specifically bequeathed, it remains subject to the claims of creditors of the testator, and, therefore, the executor is the proper person to receipt for the money.[6] It does not seem to have been settled whether, when creditors follow an insurance policy assigned in fraud of their rights, they are entitled to recover the amount of the insurance money, or only the amount of premiums paid from their debtor's estate. It was apparently assumed in Briggs v. McCullough,[7] that if the amount of premium was in excess of the sum allowed by statute, the whole amount of the insurance was liable to the claims of creditors, while in Jacob v. Continental Life Insurance Co.,[8] it seems to have been assumed, that in such a case the creditor would take only a proportionate sum. There have been one or two unreported cases in New York, in which it has

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[1] Anthracite Ins. Co. v. Sears, MSS. Supreme Court of Mass.

[2] Appeal of Elliot's Executors, 50 Penn. 75. See McCord v. Noyes, 8 Bradf. 139. In a recent case in Louisiana it has been held, that it is as much the husband's duty to insure his life for the benefit of his wife and family as to buy food or clothing, and that the creditors have no right to have the proceeds of a policy for such purpose applied to their debts. Succession of Hearing, MSS. Second Dist. Court of New Orleans.

[3] Stokes v. Coffey, 8 Bush, 533.

[4] 1 & 2 Vict. c. 110; see Skarf v. Soulby, 1 Mac. & Gor. 364; Dunlop v. Johnston, 1 L. R. Sc. App. 109; Schondler v. Wace, 1 Camp. 487.

[5] Stokoe v. Cowan, 29 Beav. 637; s. c. 7 Jur. N. S. 901; 30 L. J. Ch. 882; 9 W. R. 801; 4 L. T. N. S. 695.

[6] Bunyon, 369.

[7] 36 Cal. 542; *ante*, § 6.

[8] 1 Cincin. 519.

been held that only the premium paid could be recovered by creditors. It has already been noticed that the statutes of the states which make any provision upon the subject, as well as that of England,[1] only permit a recovery of the amount of premiums, but upon principle and upon considerations of public policy, it would seem that the other rule should prevail.

§ 354. **Liability of Company to Actions in Different Jurisdictions.**—A question which may become very important was presented in the case of Merrill v. New England Insurance Co.[2] A resident of Illinois having insured his life with an insurance company chartered by Massachusetts, by a policy payable to himself, his representatives or assigns, and conditioned to be void if assigned without consent of the insurers, delivered it to a creditor residing in Massachusetts, as a pledge for the debt, and died, leaving the debt unpaid. An administrator of his estate was appointed in Illinois; and afterwards the creditor was appointed ancillary administrator in Massachusetts. The principal administrator then sued the insurers on the policy in the place of the domicil of the assured, and their agent duly accepted service of the summons in the suit and of an injunction not to pay the money to the creditor, under a statute requiring such acceptance of service. The creditor, as ancillary administrator, afterwards brought a suit on the policy against the insurers in Massachusetts, in which they admitted their liability and willingness to pay the policy to the person entitled. And it was held that the pendency of the first suit was no bar to the maintenance of the second suit; the right of the plaintiff in the second suit, inasmuch as he represented the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, being superior to that of the principal administrator. The court, after observing that there was no doubt that the appointment of the administrator in Massachusetts was legal and proper, adds: "Such administration is auxiliary only when the domicil of the intestate was elsewhere at the

[1] *Ante,* § 323.

[2] 103 Mass. 245.

time of his decease, if there is an administrator at the place of domicil. It extends to all assets found within the state; and, within the jurisdiction where granted, it is exclusive of all other authority. The administrator appointed at the place of domicil of the deceased is the principal administrator, and personal securities, in the possession and control of the intestate at the time of his decease, vest in him. He can do no legal act for their collection in another jurisdiction, without an ancillary appointment there. And, if another has already been appointed auxiliary administrator, the collection can be made within that jurisdiction only through him. But the principal administrator may always dispose of or collect such securities, if he can do so without being obliged to resort to the domicil of the debtor. Having possession of, and a legal title to, the instrument, or evidence of the demand, and finding the debtor or his property within the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached. The appointment by the insurance company of a general agent, with authority to accept, in behalf of the principal, service of legal process in Illinois, subjects the defendant to the suit brought by the principal administrator in the courts of that State. As that suit was first brought, and apparently embraces the whole cause of action, so that a judgment therein would merge all liabilities of the defendant upon the policy, we should be inclined to hold that it was exclusive of any other remedy, so that no action could be prosecuted in any other court upon the same contract at the same time, if the administrator in Illinois had then had the legal title and possession of the policy, or the absolute right of possession.[1] * * The administrator in Illinois and the administrator in Massachusetts are not the same party. They are not even in privity with each other. The authority and

[1] Refer to Whipple v. Robbins, 97 Mass. 107; Newell v. Newton, 10 Pick. 470; Wallace v. McConnell, 13 Pet. 136; Embree v. Hanna, 5 Johns. 101; American Bank v. Rollins, 99 Mass. 313.

right of each is independent and exclusive within the jurisdiction of his own appointment. If, therefore, the policy had been in the legal custody and control of the principal administrator, the institution of proceedings for the collection of its proceeds by him, in the courts of Illinois, and jurisdiction of the defendant or its property obtained thereon, would have been such an appropriation of the claim as a part of the assets of the estate subject to administration there, as would have excluded the ancillary administration from any authority over it. But, upon the facts stated, we are satisfied that the in testate had parted with the possession of the policy, upon a valuable and legal consideration, in his lifetime; so that, at his decease, he had no right of possession, and none passed to his administrator, except subject to such rights as had been conferred by the pledge and delivery of the policy by the intestate to his uncle Thomas T. Merrill. The agreed statement shows a distinct and unequivocal pledge of the policy to secure the intestate's note for seven hundred dollars, given for money lent to him by Thomas T. Merrill, upon the assurance and condition that it should be so secured. The policy was delivered in pursuance of that agreement, and remained in the possession of Thomas T. Merrill until he was appointed administrator. This was sufficient to constitute a good pledge of the instrument, giving to the pledgee an equitable interest in the proceeds of it. In that state of facts, if the principal administrator had himself received the ancillary appointment in Massachusetts, he could not have reclaimed the policy from the hands of Thomas T. Merrill without payment of the note in redemption of the pledge. It is unnecessary to consider now, whether, beyond this, the claim of the parents of the intestate would be protected against the general interests of the estate. It is sufficient that there was a right of possession in Thomas T. Merrill, superior to that of the intestate or his administrator, and which he might pass over to the administrator in Massachusetts upon such terms as he saw fit, consistent with his limited rights. His interest in the policy is not a mere order for a part of the proceeds, but extends to

the whole policy alike. With his concurrence the auxiliary administrator may maintain a suit and collect the proceeds of the policy. Without it neither he nor the principal administrator could control the possession or collect the proceeds. The pledge makes it no longer a question of jurisdiction, as affected by priority of suit, comity between the states, or otherwise, but one merely of the right of the respective parties claiming an interest in the policy. The right of the plaintiff in this suit is superior to that of the principal administrator in Illinois, because he represents the equitable interest and right of immediate possession and control of the pledgee, as well as the legal capacity to sue, which remains in the representatives of the estate of Howard M. Merrill. That legal right to sue is held by the administrators of Howard M. Merrill, wherever appointed, in trust for the benefit of the equitable assignee of the claim. The assignee is entitled to control any suit brought for its recovery. His right would be protected by the courts against any attempt of the administrator to collect or release the demand in disregard of his interests. Upon the same principle, it would be equally protected against prejudice from any attempt to anticipate him by means of a suit instituted by such administrator in his own behalf and without recognition of the rights of the assignee. Within the same jurisdiction, the respective rights of the assignor and assignee may be readily adjusted, and suits controlled. The difficulty arises from the existence of suits in separate and independent jurisdictions. There is a class of decisions referred to by the defendant, particularly affecting questions of jurisdiction between the federal and state courts, to the effect that a subject-matter once brought within the jurisdiction of a court of general jurisdiction, whether by a suit *in personam* or proceeding *in rem*, or even by process of attachment, is in the custody of that court, and cannot be withdrawn or controlled by any process or proceeding of any other court. But that doctrine is explained and narrowly limited by Mr. Justice Miller, in Buck v. Colbath.[1]

[1] 3 Wall. 334.

It does not apply to this case, for reasons already indicated, because the policy, having been pledged and delivered to another in the lifetime of the intestate, was never in the legal possession of his administrator in Illinois, and therefore was never properly brought within the jurisdiction of the courts in that state, either as assets subject to administration, or as a cause of action which the administrator there could maintain. He could not, by commencing a suit there, transfer to those courts the determination of the rights of the pledgee, so as to compel him to seek them by intervening in such suit. The pledgee had an independent title, accompanied by possession of the policy; and by bill in equity in his own name, or by suit in the name of the administrator in Massachusetts, could enforce his claim. Neither the administrator in Massachusetts nor the administrator in Illinois would be allowed to defeat the prosecution of such a suit. Against either administrator, seeking to collect the amount of the policy by other proceedings or means, the insurance company have a sufficient defense. That defense stands not merely upon the jurisdiction and judgment of the court, but equally well upon the title of the pledgee, yielded to by the insurance company without suit.

"We have thus far considered the question, purposely, without regard to the condition in the contract which renders it void in case 'the policy or any interest therein shall be assigned without the written consent of said company.' We do not see how this condition can affect the question of jurisdiction for the enforcement of the contract, or the relative rights of the several parties claiming to control the possession of the policy and its proceeds. The condition does not prevent the transfer or pledge of the policy. It reserves to the company the right to give or to refuse its consent to such transfer, and, if made without its consent, to avoid its contract altogether. The effect of the condition is to defeat the policy, not to defeat the transfer. It is because the transfer takes effect that the policy becomes void or voidable. By the contract of pledge, and delivery of the policy, the pledgee acquired an interest therein, which he is entitled to maintain

against the assured and his legal representatives. He might have made that interest perfect against the insurance company also, by obtaining its consent to the pledge. The assured not having required the pledgee to obtain that consent as a condition of the transfer, his representatives cannot set it up as a breach of obligation which will defeat the pledge. It was no more the duty or for the interest of the pledgee, than of the pledgor, to obtain such consent. The assured, therefore, could only defeat the interest of the pledgee, by defeating the policy altogether. His obligations as pledgor forbid him to do this. Besides, the condition in the policy is one to be availed of at the election of the insurance company, and not at the election of any other party to the contract. The company may waive the condition, if it sees fit to do so. This, we think, has been done in the most formal and effectual manner possible, by omitting to set it up in the pleadings, and by submitting this case to the determination of the court upon an agreed statement, in which the facts of the transfer are fully disclosed, but not relied on at all to defeat the policy. On the contrary, it is expressly agreed that 'the sole ground of defense in this case, as claimed by the defendant, is, that the defendant corporation is not liable, under the circumstances, to pay the plaintiff, but claims that said defendant corporation is liable to pay the administrator in Illinois.' * * If the facts disclosed here are properly pleaded and proved in the courts of Illinois, or those of the United States to which the suit in Illinois has been removed, we cannot think that the defendant is in danger of being again held liable there. Upon the agreed statement, being satisfied that the plaintiff, as administrator of the intestate's estate in Massachusetts, and representing also the equitable interest and possessory right of the pledgee of the policy, is entitled to its control and collection, in preference to the principal administrator in Illinois, we feel bound to render judgment accordingly for the amount due from the defendant by the terms of the policy."[1]

[1] Upon the general question of liability to double actions, see Lemon v. Phœnix Mut. L. Ins. Co. 38 Conn. 294; s. c. 1 Ins. Law Jour. 520.

CHAPTER XI.

TIME AND PLACE OF ENFORCING CLAIMS UNDER A POLICY, AND THE LAW GOVERNING SUCH ENFORCEMENT.

§ 355. The policy usually provides when the money promised by it shall become due. This time is ordinarily sixty days after the presentation of the proofs of death. The proofs themselves are sometimes required to be presented within a time limited after the death, and ordinarily no action can be maintained upon the policy until the time fixed has elapsed.[1] But if the company absolutely deny all liability upon the policy, it has been held that an action may be commenced without waiting for the expiration of the time limited. As the time is given to enable the company to investigate the facts connected with the loss and its liability, it seems to be supposed that a denial of all liability is a waiver of the stipulation. It is difficult, however, to see on what principle such a conclusion rests. The insured sues upon a policy, which, in terms provides that there is at the time the action is brought no liability under it. Because the insurer, relying upon one defense, denies his liability, he can hardly be said, with any justice, to waive other defenses.

§ 356. **Limitation of Time for bringing Actions.**—Many policies contain a provision limiting the time within which an action may be brought upon them. This time is shorter than that ordinarily allowed by the statutes of limitation for actions upon contract. Sometimes the limitation is to a certain period after the death, in others it is a certain period after the presentation of proofs of the death, which proofs are required to be presented within a time also limited.

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[1] Massachusetts has a statute affecting this subject.

The validity of such limitations has been repeatedly questioned, but, though there are some decisions to the contrary,[1] it may now be considered as settled, that such provisions are valid.[2] The usual language of the provision is to the effect that no action shall be maintained or no recovery had unless the action is brought within the time limited. A provision that it must be "prosecuted" within a time limited, means a prosecution by suit, not a mere presentation of proofs and demand of payment.[3] Nelson, J., says:[4] "The true ground, we are inclined to think, upon which the clause rests and is maintainable, is, that by the contract of the parties the right to indemnity, in case of loss, and the liability of the company therefor, do not become absolute unless the remedy is sought within the year. The stipulation goes to the right as well as to the remedy. Indeed the time within which the remedy is to be enforced is prescribed for the purpose of reaching and regulating the rights of the insured under the contract. Although the condition is subsequent, it is, if lawful, as operative and binding as a condition precedent, and that it is lawful, as well as a very essential part of the contract, we cannot doubt." Redfield, C. J., says:[5] "Judge Nelson holds it a defense to the merits of the claim and calls it a condition subsequent in the contract, by which the right to indemnity

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[1] French v. Lafayette (F.) Ins. Co. 5 McLean, 461; Eagle Ins. Co. v. Lafayette (F.) Ins. Co. 9 Ind. 443.

[2] Riddlesbarger v. Hartford (F.) Ins. Co. 7 Wall. 386; Roach v. N. Y. & E. (F.) Ins. Co. 30 N. Y. 546; Ripley v. Ætna (F.) Ins. Co. 29 Barb. 552; s. c. 30 N. Y. 136; Ames v. N. Y. Union (F.) Ins. Co. 4 Kern. 253; Amesbury v. Bowditch Mut. F. Ins. Co. 6 Gray, 596; Keim v. Home Mut. F. & M. Ins. Co. 42 Mo. 38; Fullam v. N. Y. U. (F.) Ins. Co. 7 Gray, 61; Cray v. Hartford F. Ins. Co. 1 Blatch. C. C. 80; Wilson v. Ætna (F.) Ins. Co. 27 Vt. 99; Brown v. Roger Williams (F.) Ins. Co. 5 R. I. 394; s. c. 7 R. I. 301; N. W. (F.) Ins. Co. v. Phœnix O. & C. Co. 31 Penn. 448; Brown v. Savannah Mut. (F.) Ins. Co. 24 Geo. 97; Carter v. Humboldt F. Ins. Co. 12 Iowa, 287; Gooden v. Amoskeag F. Ins. Co. 20 N. H. 73; Patrick v. Farm. (F.) Ins. Co. 43 N. H. 621; Yoell v. Manhattan Ins. Co. 3 Pacific Law Rep. 9. In Williams v. Vt. Mut. F. Ins. Co. 20 Vt. 222, and Portage Co. Mut. (F.) Ins. Co. v. West, 6 Ohio St. 599, a similar limitation contained in the charter was sustained. Ketchum v. Protection (F.) Ins. Co. 1 Allen (New Brunswick), 136, 187, is an able decision upholding such limitation. Some of the States which recognize the right to enforce such limitations have restricted it by statutes.

[3] Merch. Mut. (F.) Ins. Co. v. Lacroix, 35 Texas, 249.

[4] Cray. v. Hartford F. Ins. Co. 1 Blatch. C. C. 280.

[5] Wilson v. Ætna (F.) Ins. Co. 27 Vt. 99.

for the loss is defeated. I should say it was a condition precedent to the right of recovery, which is the same thing in a different form of words."

It makes no difference as to the validity of the condition that the contract is not made nor the action brought in the state where the company is established. It is a part of the contract, not of the remedy, and follows the contract wherever it is attempted to be enforced.[1]

§ 357. **Attempts to Qualify the Rule.**—It has been held in one case,[2] that such a limitation rests upon the tacit condition that the insurer shall be accessible to the service of process, if not for the whole period of the limitation, at least for a reasonable time immediately preceding its expiration, and that, if this is not the case, the limitation is invalid. It was accordingly held that where process was issued before the time limited had expired, returnable two days after the expiration, and no agent of the insurer could be found on whom to make service, a second action commenced after the time limited had expired could be maintained. A contrary view has been taken in New Brunswick,[3] and it seems to us that the decision in Michigan is an attempt to accomplish by judicial decision what has now been attained by statutory provisions, namely, that a foreign company shall always have some one in any state where it transacts business, upon whom process may be served. Whether this is done or not, if a person chooses to enter into a contract which contains the limitation referred to, he must be bound by it without reference to the question whether he can enforce his contract within the state of his residence. But if the interest insured cannot, from the nature of the case, be defined within the time limited (as in the case of a mechanic's lien, where an action must be prosecuted to termination before the amount of interest can be determined), the limitation may be well

[1] Fullam v. N. Y. Union (F.) Ins. Co. 7 Gray, 61.
[2] Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202.
[3] Ketchum v. Prot. (F.) Ins. Co. 1 Allen (N. B.) 136.

held not to be intended to apply.[1] A provision indorsed on the policies usually issued by a company limiting the time within which any proceedings in respect to loss may be taken, has no application where the company refused to complete the policy and a bill was filed to compel them to issue a policy or to pay the loss.[2]

§ 358. **Condition liberally construed and readily waived.**—Conditions imposing a short statute of limitations are, however, construed very liberally in favor of the assured. Where the condition was that no action should be sustainable unless commenced within six months after the loss occurred, and that payment should be made in sixty days from the date of adjustment of the loss, it was held that these two provisions must be construed so as not unnecessarily to conflict, and as the sixty days after adjustment did not expire till more than six months after the loss, the action was not barred, the provision being construed as meaning, in effect, six months after the right to sue accrued.[3]

A provision of this nature is, moreover, one which the company will be very readily held to have waived, or to have become estopped from taking any advantage of. In Ames v. New York Union Insurance Co.,[4] the court say: "A third ground was, that there could be no recovery, for the reason that the action was not commenced within six months next after the loss occurred. The fire was on the 5th July, and the six months expired on the 5th of the January following. * * If the conduct of the defendants was such as to induce the plaintiff to suppose that it was not intended to insist upon, but to waive the condition, and by the act of the company itself he was prevented from bringing his suit until after the expiration of six months, there would be no bar. It was not in all cases that the action was to be barred unless commenced within six months after the loss. By a prior condition to the one in question, the proofs of loss were to be delivered to

[1] Stout v. City F. Ins. Co. 12 Iowa, 371; Longhurst v. Star (F.) Ins. Co. 19 Iowa, 364.
[2] Penley v. Beacon (F.) Ass. Co. 7 Grant Ch. (Canada), 130.
[3] Mayor v. Hamilton F. Ins. Co. 39 N. Y. 45; s. c. 10 Bosw. 537.
[4] 4 Kern. 253.

the secretary within thirty days after the fire. Losses were due and payable at the secretary's office in ninety days after due proofs of loss, amended and completed, had been filed in his office, in compliance with the terms and conditions of insurance. The company could wait the six months, and then interpose objections to the proofs, and upon such objections being obviated, and the amended or completed proofs filed, have ninety days thereafter to pay the loss. In such case clearly there would be no bar. If the insured commenced his suit, under the twelfth condition, within six months after the loss, the company might defend themselves on the ground that it was prematurely brought, losses not being due and payable, by the ninth condition, until ninety days after filing the amended proofs in the secretary's office. It seems quite obvious that the twelfth condition only contemplated a case where the proofs of loss were originally complete, and filed without objection, and the insured delayed bringing his suit, not only for the ninety days after such filing (which he was bound to do), but for an indefinite period afterwards. The object in view was to effect a speedy settlement of claims against the company. The defendants were to have ninety days to pay the loss, after the completion and filing of the proofs, but if they chose for any reason to defend, then the action was to be brought within a limited time after neglect or refusal to pay, or be barred. The defendants had it in their power, by objecting to the proofs of loss, and neglecting or refusing to file them, to extend the time in which they were required to pay beyond the period of six months after the occurrence of the loss; and in such case clearly it could not be pretended that the insured had stipulated away his right of action, but the defendants would be deemed to have waived the twelfth condition. In this case the proofs of loss were delivered to the defendants some nine days after the fire. They were retained, without objection, eighty-five days, or within five days of the time when the loss was due and payable by the ninth condition. It was then first suggested by the secretary that the proofs were incomplete, in not setting forth, as

required, whether or not the insured property was incumbered. Seven days thereafter, and on the 14th October, the plaintiff transmitted an affidavit to the company supplying the alleged defect. No further objection was heard from the defendants; but they had secured all that was probably desired, an extension of the time to pay the loss for ninety days from the 14th October, and put it out of the power of the plaintiff to successfully maintain an action commenced within six months after the loss occurred. The six months would have expired on the 5th January, 1854, whilst the loss was not due and payable by the ninth condition, nor could the company be compelled to pay, until the 12th January. Thus things remained until the 2d January (within three days of the expiration of six months after the loss), when the secretary was asked when the defendants would pay the plaintiff his loss. The inquiry was made to the president and secretary, in the office of the company, and the secretary replied, when it was due—that the plaintiff would then get his pay, and might be so informed. The time when due, as stated in the office, was the 14th January, and it was then the company promised that payment should be made. The plaintiff was notified that the company would rely upon the ninth condition. No intimation was given that, unless action was brought within three days afterwards, they would avail themselves of the bar prescribed in the twelfth condition. Indeed, the acts and promise of the officers of the company were directly calculated to lull the plaintiff into inactivity, and to assure him that if he would forbear suing until the 14th January, his money should be promptly forthcoming. He was told, in effect, that the defendants would insist on the terms of the ninth condition as to the time when the loss was due and payable, and that if he commenced an action to save the bar prescribed by the twelfth condition, they should interpose the defense that, by the contract, the insurance money was not yet due and payable. It cannot be doubted, under the proof in the case, that the defendants intended to and did waive the limitation stipulated by the twelfth condi-

tion."[1] Though a mere negotiation looking to a reference to arbitration has been held not to waive the limitation,[2] it is also held[3] that if the assured is induced by any act or omission of the company to delay the presentation of proofs, it prolongs the time by as long as he is induced so to delay. So if it makes an adjustment,[4] or holds out reasonable hopes of one.[5]

The limitation forbidding a suit till after sixty days from the presentation of proofs, does not apply where the company peremptorily refuses to pay on the ground that they are not liable at all.[6] And if the company calls for more proof, which the assured is in good faith attempting to furnish, he has a right to consider that the limitation is waived.[7]

In a case where the short limitation was contained in the charter, it was held[8] that, after the cause of action was barred, it could not be revived by an acknowledgment or a new promise; but numerous cases seem to assume that the contrary is the law where the limitation is contained only in the policy.[9]

In Semmes v. City Fire Insurance Co.,[10] it was held that though the rebellion suspended the running of the time limited in the policy within which action was to be brought,

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[1] To same effect, Mayor v. Hamilton F. Ins. Co. 10 Bosw. 537; s. c. 39 N. Y. 45; Grant v. Lex. F. L. & M. Ins. Co. 5 Ind. 23; Peoria M. & F. Ins. Co. v. Whitehill, 25 Ill. 466; Yoell v. Manhattan (F.) Ins. Co. 3 Pacific Law Rep. 9.

[2] Gooden v. Amoskeag F. Ins. Co. 20 N. H. 73; but see cases under last note.

[3] Killips v. Putnam F. Ins. Co. 28 Wisc. 472.

[4] F. & M. Ins. Co. v. Chesnut, 50 Ill. 111; Black v. Winnesheik (F.) Ins. Co. 1 Ins Law Jour. 811.

[5] Peoria M. & F. Ins. Co. v. Whitehill, 25 Ill. 475; Mickey v. Burlington (F.) Ins. Co. 2 Ins. Law Jour. 15.

[6] Ætna (F.) Ins. Co. v. Maguire, 51 Ill. 342.

[7] Curtis v. Home F. Ins. Co. 1 Biss. 485; Ide v. Phœnix (F.) Ins. Co. 2 Biss. 333.

[8] Williams v. Vermont Mut. F. Ins. Co. 20 Vt. 222. To same effect, Ketchum v. Prot. (F.) Ins. Co. 1 Allen (N. B.) 136; Lumpkin v. Western (F.) Ass. Co. 13 Upper Can. Q. B. 237.

[9] Ames v. Union (F.) Ins. Co. 14 N. Y. 254; Grant v. Lexington (F.) Ins. Co. 5 Ind. 23; Gooden v. Amoskeag (F.) Ins. Co. 20 N. H. 73; Schroeder v. Keystone (F.) Ins. Co. 2 Phila. 286; Ripley v. Ætna (F.) Ins. Co. 30 N. Y. 136; Peoria (F.) Ins. Co. v. Hall, 12 Mich. 202; Peoria F. Ins. Co. v. Whitehill, 25 Ill. 466; Longhurst v. Star (F.) Ins. Co. 19 Iowa, 364.

[10] 6 Blatch. C. C. 445.

yet that it commenced again on the issue of the President's proclamation, in 1865, removing all restrictions upon intercourse with the rebellious states east of the Mississippi, and that therefore if the time which elapsed after this loss and before the rebellion, added to the time which passed after the close of the war and before the action was brought, exceeded in the aggregate the time limited in the policy, the action could not be maintained; but the Supreme Court held that, though this would be the proper construction in a case where the limitation was imposed by statute, yet where the contract required an action to be brought "within the time of twelve months next after the loss shall occur," and if it was brought later that "the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim," that when the time fixed was prevented from running, as it was by war, the condition was blotted out from the contract, and the parties were left to the limitation provided by statute for such contracts.[1]

§ 359. **Effect of Limitation where One Action is Brought but Discontinued.**—In some cases an action has been brought within the time required, but has been for some reason discontinued and a new one brought after the time limited had expired. In such cases there has been some apparent, if not real, conflict in the decisions. Thus, it has been held in Vermont[2] that the second action is barred, while in Ohio the contrary has been decided,[3] but in Vermont the language of the provision was in effect that no recovery should be had unless the action was brought within the time limited, while in Ohio the language was that "all claims under this policy are barred unless prosecuted within one year from the date of the loss." It is difficult to see any ground of principle upon which it can be held that an action erroneously commenced, and either dismissed or discontinued, can extend the time limited. The Supreme Court of the United States well

[1] 13 Wall. 158.
[2] Wilson v. Ætna (F.) Ins. Co. 27 Vt. 99; s. c. 8 Month. Law Mag. 329.
[3] Madison (F.) Ins. Co. v. Fellowes, 1 Disney, 217.

says:[1] "The action mentioned, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained unless such action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract." Or as stated in Vermont,[2] the stipulation "is not that an action shall be commenced within twelve months, but that no recovery shall be had unless such action is commenced within twelve months after the loss. Such action can only signify the action in which the recovery is sought."

But where an action was duly commenced in time, which it was found could not be sustained by reason of a mistake in the form of the policy, and a bill in equity was thereupon brought while the first suit was pending, but after the time limited had expired, the object of the equity action being to have the policy corrected and to enjoin the company from pursuing the defense set up in the first action, it was held that the bill in equity was not barred.[3] In another case,[4] in the same state, after a loss had occurred, the money was attached by a creditor of the assured, by a process of foreign attachment within the time limited, and judgment obtained against the creditor. The law required this as a preliminary to a suit of *scire facias* against the company. The latter was brought after the time limited had expired, but was held not to be barred, the court saying: "The provision is that no suit or action in any court of law or chancery shall be sustained unless commenced within twelve months. * * But by a suit, within the meaning of this provision of the policy,

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[1] Riddlesbarger v. Hartford (F.) Ins. Co. 7 Wall. 386, 390.

[2] Wilson v. Ætna (F.) Ins. Co. 27 Vt. 99; to same effect, Brown v. Roger Williams (F.) Ins. Co. 7 R. I. 301.

[3] Woodbury Savings Bank & Build. Ass. v. Charter Oak F. & M. Ins. Co. 31 Conn. 517.

[4] Harris v. Phœnix (F.) Ins. Co. 35 Conn. 310.

is most clearly meant any proceeding in a court for the purpose of obtaining such remedy as the law allows a party under the circumstances."

§ 360. **Conditions as to Place of Suit are Void.**—As to another condition, which at first sight would seem to be governed by similar considerations, the decisions have been uniformly adverse. We refer to the condition requiring any action upon the policy to be brought in a particular state or county. In one case, Shaw, C. J., delivering the opinion, says:[1] "The provision on which this defense depends is found in article 22d of the by-laws. After providing that notice of loss shall be given, and that thereupon the directors shall proceed to determine whether any loss has occurred for which the company are liable, and if so, ascertain the amount, it provides that, if the assured do not acquiesce in such determination, as to the liability or the extent of it, and both parties do not agree to refer, as they may, 'the assured may, within four months after such determination, but not after that time, bring an action at law against the company for the loss claimed, which action shall be brought at a proper court in the county of Essex.' Here are no negative words, and, strictly speaking, no stipulation that the action shall not be brought elsewhere, unless they are implied by the term 'shall be brought' in Essex. These words were not necessary to give the assured a remedy, because without them it is conceded that they would have a remedy at common law, as in all cases of breach of contract, for which no stipulation is necessary. * * The court are of opinion that there is an obvious distinction between a stipulation by contract, as to the time when a right of action shall accrue and when it shall cease, on the one hand, and as to the forum before which, and the proceedings by which, an action shall be commenced and prosecuted. The one is a condition annexed to the acquisition and continuance of a legal right, and depends

[1] Nute v. Hamilton Mut. (F.) Ins. Co. 6 Gray, 174. To same effect, Amesbury v. Bowditch Mut. (F.) Ins. Co. 6 Gray, 596.

on contract and the acts of the parties; the other is a stipulation concerning the remedy which is created and regulated by law. Perhaps it would not be easy or practicable to draw a line of distinction, precise and accurate enough to govern all these classes of cases, because the cases run so nearly into each other; but we think the general distinction is obvious. The time within which money shall be paid, land conveyed, a debt released, and the like, are all matters of contract, and depend on the will and act of the parties; but, in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The stipulation, that a contracting party shall not be liable to pay money, or perform any other collateral act, before a certain time, is a regulation of the right too familiar to require illustration; a stipulation, that his obligation shall cease if payment or other performance is not demanded before a certain time, seems equally a matter affecting the right. A stipulation, that an action shall not be brought after a certain day, or the happening of a certain event, although, in words, it may seem to be a contract respecting the remedy, yet it is so in words only; in legal effect it is a stipulation that a right shall cease and determine if not pursued in a particular way within a limited time, and then it is a fit subject for contract, affecting the right created by it.

"But the remedy does not depend on contract, but upon law, generally the *lex fori* regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract. Suppose it were stipulated in an ordinary contract, that in case of breach no action shall be brought; or that the party in default shall be liable in equity only and not at law, or the reverse; that in any suit to be commenced no property shall be attached on mesne process or seized on execution for the satisfaction of a judgment, or that the party shall never be liable to arrest; that, in any suit to be brought on such contract, the party sued will confess judgment, or will waive a trial by jury, or consent that the report of an

auditor appointed under the statute shall be final, and judgment be rendered upon it, or that the parties may be witnesses, or, as the law now stands, that the plaintiff will not offer himself as a witness; that, when sued on the contract, the defendant will not plead the statute of limitations or a discharge in insolvency; and many others might be enumerated; is it not obvious, that, although in a certain sense these are rights or privileges which the party, in the proper time and place, may give or waive, yet a compliance with them cannot be annexed to the contract, cannot be taken notice of and enforced by the court or tribunal before which the remedy is sought, and cannot therefore be relied on by way of defense to the suit brought on the breach of such contract? * * The rules to determine in what courts and counties actions may be brought are fixed upon considerations of general convenience and expediency by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience. Such contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from the personal, social or political standing of parties in one or another county. It might happen that a mutual insurance company, in which every holder of a policy is a member, and of course interested, would embrace so large a part of the men of property and business in the county, that it would be difficult to find an impartial and intelligent jury. * * There being no authority upon which to determine the case, it must be decided upon principle. The question is not without difficulty, but, upon the best consideration the court have been able to give it, they are of opinion that it is not a good defense to this action, that it was brought in the county of Suffolk and not in the county of Essex."

In another case,[1] in which the same conclusion was

[1] Hall v. People's Mut. F. Ins. Co. 6 Gray, 185.

arrived at as to a similar condition in the policy issued by a stock company, the same judge says: "After a contract has been made and broken, the remedy is regulated by law, and of course must be governed by the law of the forum where the remedy is sought, and not by the law of the place where the contract is made. * * It is a well settled maxim that parties cannot, by their consent, give jurisdiction to courts where the law has not given it; and it seems to follow, from the same course of reasoning, that parties cannot take away jurisdiction where the law has given it." A similar conclusion has been reached in Maine[1] and in Missouri,[2] though in the case in the latter state there was the additional element that the laws of the state required foreign insurance companies to consent to be sued in the state as a condition of doing business there. In the case in Maine the provision as to the place of bringing actions was in the charter of a company created in New Hampshire.

§ 361. **What Law is Applicable to the Contract.**—It may at times be important to determine by what laws the contract of insurance is governed, whether by the law of the state where the assured resides and received his policy, or of that by which the company is created. Some states, like New Jersey, do not consider it necessary that the assured should have any interest in the life, while most of the others hold the contrary. The manner in which the proceeds of the policy shall be distributed may be seriously influenced by the decision as to what law is applicable. The question is of course one of the intention of the parties, but in the absence of any express indication of that intention, it will ordinarily be held that the law of the state under which the company is created will govern, especially if, as is generally the case, that is, by express provision, or through the failure

[1] Bartlett v. Union Mut. (F.) Ins. Co. 46 Me. 500.

[2] Reichard v. Manhattan L. Ins. Co. 31 Mo. 518. In Keim v. Home Mut. F. & M. Ins. Co. 42 Mo. 38, a clause of limitation as to time was sustained, no reference being had, apparently, to a clause in the policy limiting the court in which an action should be brought.

to designate any other place, to be considered the place where the money is to be paid.[1] Thus in Ruse v. Mutual Benefit Life Insurance Co.,[2] the court say: "In considering this point it is necessary, first, to ascertain by what law the question is to be determined. The contract was actually made between the plaintiff and an agent of the defendants in the state of Georgia; but the defendants, as is to be inferred from the case, were incorporated in the state of New Jersey, and the policy purports upon its face to have been executed at the city of Newark, in that state. Under these circumstances, although the suit is brought in this state, the interpretation and validity of the contract cannot depend upon the laws of New York. The *lex fori* governs as to the remedy or remedies for enforcing the contract, but not as to its construction or the legal rights arising under it. These depend usually upon the laws of the place where the contract is to be performed, although where there is anything in the circumstances to show that the parties had specially in view the law of the place where the contract is made, this law will govern, although the contract is to be performed elsewhere. I see nothing in the present case to indicate that the parties contracted with special reference to the law of Georgia. As no other place was mentioned, payment was of course to be made in New Jersey, where the principal office of the company was located. The contract was to be performed there, and hence upon the general principle adverted to, the validity of the contract and the rights and obligations of the parties under it must depend upon the law of New Jersey."

§ 362. **Place of the Contract Affected by Powers of Agent.**— The question of the place of the contract may often be affected by the powers of the agent. Thus, if an agent has power to make an absolute contract of insurance, it would doubtless,

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[1] St. John v. Am. Mut. L. Ins. Co. 2 Duer, 419; s. c. 3 Kern. 31; Succession of Hearing, MSS. Second Dist. Court of New Orleans.

[2] 23 N. Y. 516.

unless controlled by some language contained in the policy, be governed by the law of the place where the agent acts.[1] On the other hand, if the agent is, as is usually the case, only authorized to receive and forward applications, we have already seen [2] that the contract is completed when the company receives the application at its chief office and irrevocably accepts it by mailing a policy. This would undoubtedly make the place of the contract that of the mailing, where it is mailed directly to the assured.[3] But where it is mailed to its own agent, as the acceptance is perhaps not irrevocable, the question might admit of doubt. If further, as is usual, the policy is by its terms not to take effect till the premium is paid, the place where such payment is made, or if payment is waived, the place where delivery is made, would doubtless be the place of the contract.[4] Thus, where an agent residing in Ohio and having no authority to make contracts, received an application there, which with the premium notes he forwarded to the company in New York, and the latter thereupon approved of the application and sent the policy by mail direct to the applicant, it was held[5] that it was a New York contract, the court saying: "Before the company had agreed to insure, the defendant, notwithstanding the execution and delivery of the notes and applications to the agent of the company, might have withdrawn his applications, and upon his doing so, his notes would have been inoperative. Until then, the transactions were wanting in that mutuality which is essential to a valid contract. But when the company, having received the applications, accompanied with the notes, consented to insure, and issued its policies, what was before revocable, became irrevocable. What was before a mere proposition, then became invested with the attributes of a contract, and from that time each party became bound for its

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[1] Albion L. Ins. Co. v. Mills, 3 Wils. & Shaw App. Cas. 218.

[2] *Ante*, Chapter V.

[3] Ford v. Buckeye State (F.) Ins. Co. 6 Bush, 133; Bailey v. Hope (F.) Ins. Co. 56 Me. 474.

[4] *Ibid.*

[5] Hyde v. Goodnow, 3 Comst. 266.

performance. If this be so, the contracts are to be regarded as having been made when the company received and accepted the defendant's applications and issued and transmitted to him their policies. Of course, they were contracts made in the state of New York, and not in Ohio. The insurance was not effected in Ohio, nor were the policies 'signed, issued, or delivered,' there." Where a New York mutual insurance company received an application signed in Canada by persons residing there, which contained a provision that if approved by the company the policy should bear the same date as the application and take effect from that time, and the cash premium was paid to the agent, and the premium notes were signed and forwarded with the application, and the policy was thereupon sent to the mutual agent of the parties in Canada and there delivered, it was held to be a New York contract. The court say:[1] "The only circumstance in which this case differs from Hyde v. Goodnow, is that in the latter case the policy was sent by mail to the insured. That difference does not alter the rule. When the application was received and approved by the company, and the policy executed and put in course of transmission to the insured, the contract was complete, and both parties became bound; so that if a loss had occurred before its actual receipt by the insured, the company would have been responsible. The contract was consummated by the final assent on the part of the company, and upon that event and not upon its delivery to the assured, became operative. The validity of the contract is, therefore, to be determined by the law of New York. Here it was made, and here it was to be performed." Where a New York company executed policies in that state but transmitted them to agents in Baltimore, who there received applications for insurance and premiums upon policies after approval, and through whom losses were paid, it was held to be a New York contract.[2]

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[1] Western v. Genesee Mut. (F.) Ins. Co. 2 Kern. 258.

[2] Wright v. Sun Mut. Ins. Co. 6 Am. Law Reg. 485, U. S. C. C. Dist. of Md.

§ 363. But where anything remains to be done by the agent to give validity to the policy, then the law of the place of the performance of that act by the agent will govern. Most of the life policies now issued, in terms provide that they are not valid until countersigned by an agent named at a place designated. In such case the law of the place of countersigning governs.[1] In Pomeroy v. Manhattan Life Insurance Co., the court say: "The instrument sent from New York by the company was incomplete, as it was not fully executed, and declared on its face that it was void until it should be countersigned and the premium should be paid. How an instrument which declares that it is void until other acts are performed can be regarded as complete and binding, we are unable to comprehend. Had nothing further been done after it came from New York, could there have been the slightest pretence that it could operate as a binding contract? We think no one would have so contended. It was an inchoate, imperfect instrument, lacking essential and material acts to complete its binding force as a contract. And it will be observed that the final acts were to be, and were, performed in this state. And when they were performed, the instrument then for the first time became a binding instrument. It then in fact, and in contemplation of law was, executed in this state. It was also to be performed in this state. It must therefore be governed by our laws and not those of New York."

In conflict with this view it has been held in a Scotch case[2] that, where an agent in Edinburgh who had no authority to contract, received an application which he forwarded to London, whence in due time he received a policy which he delivered at Edinburgh, and received the premium there, it was an English contract, governed by the laws of England, and this even though the court admit that both the agent and the insured could have retracted at any time before the

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[1] Pomeroy v. Manhattan L. Ins. Co. 40 Ill. 398; Heebner v. Eagle (M.) Ins. Co. 10 Gray, 131; Daniells v. Hudson Riv. F. Ins. Co. 12 Cush. 416.

[2] Parken v. Royal Ex. Ass. Co. 8 Ct. of Sess. Cas. 2d Ser. 365; s. c. 18 Scotch Jur. 147.

actual delivery of the policy. The court place great weight on the fact that, though no place of payment of the sum insured was in terms provided, London was, in law, that place.

As already indicated, the law of the contract may be largely affected by the doctrine as to the completion of a contract effected by correspondence. In a case in Maine a company established in Rhode Island had appointed an agent in the former state. The agent received by mail a letter from New Hampshire asking for insurance upon property in the last named state. A policy was thereupon issued, dated in Maine, and it was held to be a Maine contract, governed by the laws of that State.[1]

§ 364. An attempt is sometimes made to give to the laws existing in many of the states, requiring foreign companies to appoint agents in them on whom process may be served, a meaning so extensive as to make the contracts arranged through such agents governed by the law of the state within which the agent acts.[2] It is conceived that such an interpretation presses those statutes beyond their proper intention and meaning, unless they contain other provisions. Where such persons are described in the statutes as "agents to all intents and purposes," the rule may be different. The effect of such statutes has, however, been fully discussed in the chapter on agents.

[1] Bailey v. Hope (F.) Ins. Co. 56 Me. 474.
[2] Manhattan L. Ins. Co. v. Warwick, 20 Grat. 614.

CHAPTER XII.

EVIDENCE IN LIFE INSURANCE.

§ 365. **Burden of Proof, and Right to Begin.**—The question upon whom the burden of proof rests is frequently of importance. Where the statements of the application are warranties, it is sometimes a vital question to decide whether the burden in the first instance rests upon the plaintiff to show a compliance with them or whether such compliance is presumed, so that the burden is upon the defendants to show a non-compliance. In England Mr. Bunyon states the rule as follows:[1] "Should any dispute arise, upon the death of the assured, as to the correctness of the statements made in the declaration, the burden of the proof, it is said, will fall upon the plaintiff, with whom it will rest, before requiring the insurers to produce any evidence to impugn them,. to make out by evidence their truth, which is, in fact, the basis of the action, and a condition precedent to any right to recover. In like manner the onus rests with the assured to prove the due fulfilment of the conditions of the policy. This rule has been thus broadly stated, and in text books, by way of warning to persons effecting insurances; but it is remarkable, that in the reported cases this apparent burden has been claimed by both parties as involving in itself the privilege of the right to begin, or of first addressing the court, and to reply. * * The general rule is, that the right to begin will rest with that party upon whom the affirmative of the issue, or the burden of proof is cast. From this it follows that this further touchstone presents itself, that he is entitled to begin, against whom the verdict would go if no evidence were offered on

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[1] P. 84.

either side. And, again, when the presumption of law is on either side, the right to begin will rest with that party upon whom the necessity of rebutting that presumption rests. Thus, for example, if the defendant pleaded that the person assured was not dead, as the presumption of law is in favor of life, the burden of proof would rest with the claimant, but if, on the other hand, the defendant place upon the record a plea amounting to a plea of fraud, as the presumption is against fraud, the onus would rest with the defendant; or if the defendant plead that notwithstanding a warranty against some specified malady, such as the gout, the assured has been afflicted therewith, as the presumption is in favor of health, the onus would rest with the defendant. It is also material to observe that the substance and not the form of the issue is to be regarded, and hence cases may occur in which each party may contend that on their side the affirmative really rests. In an action upon a life policy, the declaration, setting out the policy and the proposal as embodied in it, avers the truth of the statements made therein, and alleges generally the performance of all conditions precedent to the right to recover upon it. To this the defendants either plead the general issue, denying the making of the policy, or specifically traverse the averments against which they rely, and upon this issue is joined. Where they omit to plead the general issue, but plead only one or more special pleas, setting forth the statements made by the assured in his proposal, and denying their truth by alleging facts inconsistent therewith, or setting out the conditions of the policy, and asserting that they had not been fulfilled, the right or obligation of beginning will generally rest with them. In the earlier cases it seems to have been considered that the plaintiffs, in setting forth the claim, were bound to give some evidence in support of their statements, and the affirmative, thereupon, in the first instance, was on their side; but in the more recent decisions, and particularly since the new rules of pleading have been in force, the statement of the law which we have made appears correct.

Thus in a late case,[1] the declaration had set forth the policy, which referred generally to the proposal made to the company, and then averred that in it there was no untrue or fraudulent statement; thereupon the defendants replied that it was alleged in the declaration that the habits of the assured were sober and temperate, but that the contrary was true. The learned Judge (Parke, B.) ruled that the defendants had the right to begin, on the ground, first, that the plaintiff did not show what were the statements made in the proposal, but that they were set out in the plea and consequently must be proved by the defendants; secondly, that the allegations in the plea were allegations of falsehood amounting to fraud in the assured, and must, therefore, be proved by the party making them, the presumption being always in favor of innocence and against fraud, and that therefore, as, supposing no evidence were given in support of the plea, the plaintiff would be entitled to recover, the defendants ought to begin. The court *in banc* considered that the learned judge at Nisi Prius had been right in his ruling, and that the test as to who should begin is, to consider who would be entitled to the verdict in the event of no evidence on the other side being offered, the right being with the party on whom rested the burden of proof,—in this case the defendant; and a rule for a new trial was refused. And again, in a still subsequent action upon a life policy,[2] in which one of the conditions was that the policy should be canceled in case of the death of the assured by suicide, and the defendants pleaded that the assured died by suicide and that the premiums were ready to be returned—they were held entitled to begin."

It will be observed that Mr. Bunyon admits that the rule as stated by him is affected by the modern English rules as to pleading. Moreover, even in England, it would seem that if the breach of warranty alleged in defense does not amount

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[1] Leete v. Gresham L. Ins. Co. 15 Jur. 1161; s. c. 7 Eng. Law & Eq. 578. See also Huckman v. Fernie, 3 M. & W. 505; s. c. 2 Jur. 444.

[2] Stormont v. Waterloo L. Ass. & Cas. Co. 1 F. & F. 22; Hill v. Fox, 1 F. & F. 136.

to a fraud or a violation of law, the burden would be upon the plaintiff. Upon principle, if there is any force in the accepted definitions of warranty,[1] it would seem that the burden of proving a compliance must be upon the plaintiff. If a warranty is a "condition precedent"—"a part of the contract"—it would seem clear that the plaintiff must give at the outset some proof of compliance with such "condition precedent."[2] The distinction drawn in Massachusetts and some of the other states between warranties and representations, which are by the terms of the contract made conclusively material,[3] derives its chief, if not its only, importance from the effect which it has, or is supposed to have, upon the burden of proof. The point as to where the burden rests has been indirectly passed upon in an unreported case recently decided in Connecticut,[4] where, at the trial, a nonsuit was granted on the ground that the plaintiff had not introduced the application, though it was referred to in the policy and declaration, and shown to be a part of the contract; and this ruling was affirmed on appeal to the highest court. In various other American cases the same position has been taken in stating the distinctions between a warranty and a representation. Thus, in Campbell v. New England Mutual Life Insurance Co.,[5] the Supreme Court of Massachusetts say: "From the very nature of the case, the party seeking his indemnity or payment under the contract must bring his case within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon the plaintiff to present a case in all respects conformable to the terms under which the risk is assumed;" and in another case the same court say:[6] "An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of

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[1] *Ante*, § 34. [2] 1 Greenleaf on Evidence, § 383, ed. of 1868.
[3] *Ante*, § 63. [4] Rogers v. Charter Oak L. Ins. Co. [5] 98 Mass. 381.
[6] McLoon v. Conn. Mut. Ins. Co. 100 Mass. 472; see, also, to same effect, Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins. Law Jour. 25; Kelsey v. Univ. L. Ins. Co. 35 Conn. 225; Bobbit v. Liv. Lond. & Gl. Ins. Co. 66 North Car. 70; Wilson v. Hampden F. Ins. Co. 4 R. I. 159; Marshall on Ins. 249; 2 Greenleaf's Ev. § 383; Flanders on Ins. 208.

which rests on the assured." Yet it is not to be denied that in some recent cases a contrary view has been taken. Thus, in Swick v. Home Life Insurance Co.,[1] the court say: "The statements and declarations in the application are warranties, and the defense here is that there has been a breach of some of these warranties. Where a party relies on the breach of such a warranty, he must establish it by evidence. This may not be the rule as to promissory warranties—that is, where the party warrants that he will not thereafter do or will refrain from doing something stipulated in a policy as to the future. In this case the alleged breach of warranty is as to the statement of existing facts—the facts as to his health and the facts as to his habits—and the defendant avers the breach, and, therefore, it is for the defendant to show that there has been such a breach, and not for the plaintiff to prove that there was no breach." So it has been held,[2] that, as the declarations of the application are presumed to be true, the burden of proving them untrue is upon the company. It has also been held[3] that, if a party produces a policy in his own name, and makes proof of loss, he thereby makes a *prima facie* case entitling him to recover. The Supreme Court of the United States has very recently declared[4] that the preliminary proofs "furnished at least some evidence that the claim was just, and this they would have furnished had they contained nothing more than averments that the defendants had agreed to insure, and that the person whose life was insured had died." The latter case, however, was one where no policy had been issued, and the question raised at the trial seems to have been rather as to the sufficiency of the proofs of loss, than as to the burden of proof. In Trenton Mutual Life & Fire Insurance Co. v. Johnson,[5] the court quoted with approval the decision cited by Mr. Bunyon, and express the

[1] 2 Dillon, 160.

[2] Holabird v. Atlantic Mut. L. Ins. Co. 2 Dillon, 166, *in notis*; c. s. 2 Ins. Law Jour. 588. It is possible that the statements referred to in this case were merely representations.

[3] Illinois F. Ins. Co. v. Stanton, 57 Ill. 354; Mut. Ben. L. Ins. Co. v. Robertson, 59 Ill. 123.

[4] Manhattan L. Ins. Co. v. Francisco, 2 Ins. Law Jour. 926.

[5] 4 Zab. 576.

opinion that it states the law correctly; but, inasmuch as the plaintiff in the case before them had, in fact, given some proof of compliance with the warranties, they found it unnecessary to pass upon the question absolutely. It has also been held[1] that a policy issued upon an application which states that the assured has an interest in the life, is *prima facie* valid, and can only be avoided by proving by parol a want of interest.

If it shall be finally held that the burden of proof of a warranty is upon the assured, it will furnish additional evidence of the impolicy of the course pursued by the companies in making nearly every statement a warranty:[2] very slight proof of compliance would certainly be held sufficient.

There is no doubt that, as to mere misrepresentations, the burden of proof is upon the defendant to show them untrue.[3]

The defense of concealment is so nearly allied to the charge of fraud, that the burden of proof is upon the insurers to establish both the existence of the fact concealed, and its materiality to the risk, though the latter may be inferred from the nature of the fact.[4] To ask the plaintiff to prove that he concealed nothing, would be requiring him to prove an impossible negative. If it were a matter of general notoriety in the place of residence of the assured, this may be shown to the jury as tending to prove that the assured had knowledge of the fact.[5]

§ 366. Where the defense is death in the violation of law, the burden is on the company to satisfy the jury that the act of the deceased which occasioned his death was a voluntary criminal act.[6] The company must prove that the insured died while engaged in a criminal act, known by

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[1] Lewis v. Phœnix Mut. L. Ins. Co. 39 Conn. 100; s. c. 3 Ins. Law Jour. 123.

[2] *Ante*, § 33, note 1.

[3] Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381; Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 223; Conver v. Phœnix Mut. L. Ins. Co. 6 Chicago Legal News, 144, U. S. C. C. Dist. of Minnesota.

[4] 1 Greenleaf on Evidence, § 80, ed. of 1866; 2 *Ib.* § 398, ed. of 1868.

[5] 2 Greenleaf on Ev. § 398.

[6] Cluff v. Mut. Ben. L. Ins. Co. 99 Mass. 317; 2 Greenleaf on Ev. § 402, ed. of 1868.

him at the time to be a crime against the laws of the country where he was. But it will be presumed, not only that acts which are criminal by the common law and the laws of all civilized countries are criminal in any state, but that the deceased knew they were so.[1]

Where the defendants pleaded[2] that at the time of the declaration as to health, the habits of the person were immoderate and intemperate and he was addicted to excessive drinking, and the reply was a denial of this, it was held that plaintiff should begin. So when the defense sought to avoid the policy on the ground of false representations of the habits of the insured at its date, and of his death being caused by intemperance in the use of intoxicating liquors, it has been held that the defendants had the affirmative of the issue,[3] and that the burden of proof was upon them.[4]

In a case where there was a warranty that the insured was a person of correct and temperate habits, and had always been so, it was held[5] that the language covered the moral and physical habits of the insured so far as by special or general observation either could be noted to have an effect to shorten life and increase the risk of insurance on the same; that it became essentially a fact for the jury to decide whether the warranty was false, and there having been a conflict of testimony, it was held that a nonsuit was wrong, though it was admitted that prior to the insurance the insured had had a fit of delirium tremens. The court say: "Does this admitted fact in and of itself prove enough to make a case to be disposed of by the court? It has caused me much trouble to answer the question satisfactorily to my own mind. I have finally come to the conclusion with many remaining doubts, I freely confess, that it still

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[1] Cluff v. Mut. Ben. L. Ins. Co. 13 Allen, 308.

[2] Craig v. Fenn, 1 Car. & Marsh. 43. [3] N. Y. L. Ins. Co. v. Graham, 2 Duvall, 506.

[4] Miller v. Mut. Ben. L. Ins. Co. 34 Iowa, 222; s. c. 1 Ins. Law Jour. 747.

[5] Bickford v. N. Y. State L. Ins. Co. not reported, N. Y. Supreme Court, Erie Co. June, 1869.

remains a question for the jury. It is cogent and convincing evidence, and, with proper instructions from the court, a fair and impartial jury cannot fail to give it proper weight and effect in their verdict. Intemperate habits in an individual are to be established by proving general and specific use of spirituous liquors. Proving delirium tremens is in effect like proving immoderate use of liquor prior to the fit of delirium tremens for a longer or shorter period. I cannot see that it proves more than that."

§ 367. **Burden and Presumptions in Cases of Suicide.**—Where the defense is suicide, the defendants are entitled to begin, as the onus is on them to prove that the death was by suicide,[1] and where it appears that the death was the result either of accident or of suicidal injury, the presumption is in favor of the former.[2] Having proved that fact, if the plaintiff claims that at the time of the suicide the deceased was insane, the burden is upon him to show it, because there is a presumption in favor of sanity, and the plaintiff must prove such insanity on the part of the deceased as will relieve the act of the insured in taking his own life from the effect of the general terms of the policy.[3] There is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity; suicide is not of itself evidence of insanity.[4]

§ 368. **Evidence of Insanity.**—What is sufficient evidence

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[1] Stormont v. Waterloo L. & Cas. Ass. Co. 1 F. & F. 22; Coverston v. Conn. Mut. L. Ins. Co. 3 Ins. Law Jour. 113, U. S. C. C. per Dillon, J.

[2] Mallory v. Travelers Ins. Co. 47 N. Y. 52; s. c. 1 Ins. Law Jour. 840.

[3] *Ibid.* Also Hiatt v. Mut. L. Ins. Co. 2 Dillon, 572, *in notis;* Gay v. Union Mut. L. Ins. Co. 9 Blatch. 142; Am. L. Ins. Co. v. Isett, 2 Ins. Law Jour. 825, Penn. Supreme; McClure v. Mut. L. Ins. Co. 3 Ins. Law Jour. 221, N. Y. Ct. of Appeals; Terry v. Life Ins. Co. 1 Dillon, 403; s. c. 1 Ins. Law Jour. 132; Coffey v. Home L. Ins. Co. 35 N. Y. Supreme R. 314.

[4] Terry v. Mut. L. Ins. Co. 1 Dillon, 403; s. c. 1 Ins. Law Jour. 132; Moore v. Conn. Mut. L. Ins. Co. 3 Ins. Law Jour. 444, U. S. C. C. E. Dist. of Mich.; Coverston v. Conn. Mut. Ins. Co. 3 Ins. Law Jour. 113, U. S. C. C.; Am. L. Ins. Co. v. Isett, 2 Ins. Law Jour. 825; McClure v. Mut. L. Ins. Co. 3 Ins. Law Jour. N. Y. Court of Appeals; Coffey v. Home L. Ins. Co. 35 N. Y. Superior R. 314; Weed v. Mut. Ben. L. Ins. Co. *Ib.* 386. In Hogan v. Mut. L. Ins. Co. U. S. C. C. Iowa, jurors were excluded because they had a preconceived opinion that suicide was evidence of insanity. See Hiatt v. Mut. L. Ins. Co. 2 Dillon, 572, *in notis.*

of insanity must depend chiefly upon the facts of each case. In McClure v. Mutual Benefit Life Insurance Co., it was held,[1] that there was not sufficient proof of insanity to entitle the case to go to the jury. The court say: "It was proved that the assured, down to a short time preceding his death, was a genial, social, apparently happy man, that during this short interval there was an entire change in all these respects, that he became taciturn, apparently absent-minded, moody, and externally unhappy, complaining of severe neuralgic pain in his head. This great change attracted attention, and to a certain extent excited remarks from those who observed it. But the proof given showing that the assured was greatly embarrassed in his financial affairs, that he had appropriated to his own use money entrusted to him for investment by others; that he had made a similar use of money received by him as treasurer of a plank-road company, which he was wholly unable to restore; that he had for the purpose of raising money committed forgeries, in one of which he was detected; that he could no longer prevent the discovery of others—fully accounts for this change, as well as for his nervous restlessness and haggard appearance. All this is more naturally attributable to his knowledge of his deplorable situation, than to insanity. His replies to those who called to see him upon business, that they must call at another time, as he could not sufficiently collect his thoughts to attend to such matters, tend to prove him sane rather than otherwise, as they show that he perfectly understood his mental condition, and fully comprehended the objects of those calling for business purposes. I am unable to discover a single fact in the conduct or language of the accused during this short interval, considered in the light of his situation as known to him, which is inconsistent with his sanity."

In another case in the same state, the court at the trial dismissed the complaint under circumstances stated in the

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[1] 3 Ins. Law Jour. 221, N. Y. Court of Appeals.

opinion of the court:[1] "It appeared in evidence that the intestate caused his own death by the use of a pistol, and that there were indications in the room which he occupied that he had taken poison for the same purpose. There was also found at the time a letter in his handwriting, addressed to his brother, informing him that he had suffered for a long time with the thought of becoming insane in consequence of a disease with which he was afflicted, which he had endeavored to cure, but had finally given up all hope of doing so, and that he had concluded to put an end to his sufferings that night by poison, which he had carried for several days. There was evidence to show that the tendency of the disease with which he was afflicted was to produce a morbid mental state, one of the precursors of insanity; that the deceased was a spiritualist; that for some days, and immediately preceding his death, he appeared to be a little excited, was absent-minded, and one witness testifies that he did not appear as cheerful or talk as much as usual, and seemed to stand in a sort of melancholy state, and appeared to have a little fit of the blues. With the exception of the foregoing facts, there was no direct evidence of mental aberration or insanity. * * The testimony did not show any direct manifestation of previous insanity of a positive character, and unless the suicidal act itself may be considered as evidence of insanity, there were no facts presented which warrant the conclusion that the deceased was insane, and that his death by his own hand was not a premeditated act which he fully appreciated and comprehended. The letter which he penned before the fatal deed was perpetrated bears evidence of coolness and deliberation, and, if it is to be interpreted as written, rebuts any presumption that he acted from a sudden insane impulse. He apparently knew the nature of the act he was determined to do, and in advance gave a reason for having perpetrated it. None of the cases hold that insanity alone excuses the taking of life by the insured. Something more is required, and the courts hold that if the party is insane, it

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[1] Fowler v. Mut. L. Ins. Co. 4 Lans. 202; affirmed in Court of Appeals by default.

must be to such an extent as to render him wholly unconscious of the act to entitle his representatives to recover upon the policy. * * The real question to be determined is whether there was anything for the jury to decide as to the death of the deceased being voluntary, intentional and designed. I think that there was no evidence for the consideration of the jury on this subject, and that the evidence would not have been sufficient to have warranted a verdict in favor of the plaintiff, even if the case had been left to the jury. There was no proof of insanity, except what might be inferred from the suicide itself. And even, although, as was testified, the tendency to a morbid mental state is one of the precursors of insanity, yet the facts proved do not show that in the case of the deceased, he had passed the line where reason had entirely lost its sway, and his self-destruction was an involuntary act beyond his control. But if insane, the letter which he penned when at the point of taking the fatal step, contains intrinsic and positive testimony that he was laboring under no delusion as to the physical consequences of the act he was about to commit. He avows his intention, and states his reason for the act. It is difficult to see how any question can be made as to the act being voluntary and wilful, for the purpose of destroying life. To arrive at such a conclusion the written statement of the deceased must be disregarded and the fact must be established that he was insane."

§ 369. **Evidence in Actions to Recover back Money Paid.**— In Mutual Life Insurance Co. v. Wager,[1] an action was brought to recover back money paid on a policy, on the ground of false and fraudulent statements made at the time the insurance was effected, and of fraudulent concealment as to the cause of the death. The court held that in an action against the company to recover the sum insured the assured would have been bound by the statements of the insured, made in procuring the insurance, but that in an action by

[1] 27 Barb. 354.

the company to recover back money, the defendant was not affected by his agent's knowledge of any fact unless he himself knew it; that in such an action the burden of proof was on the company, and actual knowledge of the fact misrepresented must be brought home to the assured.

§ 370. **Other Cases as to Burden of Proof.**—Where a policy, by its terms, is to cease upon the failure to pay at maturity a premium note, the burden is on the insurers to prove non-payment.[1] Where a statute exempts from execution life insurances, "provided, however, this exemption shall not extend beyond such moneys, &c., as have been or might have been secured by the payment of an annual premium not exceeding $500," it was held that the burden was on the party claiming the exemption to show affirmatively that the case was within the provisions of the statute, and that to do this he must establish that the benefits which he was to derive from the policy were such as might have been secured by the payment of an annual premium not exceeding five hundred dollars.[2]

Where the policy was payable after due notice and proof of the death, the plaintiff, to prove such notice and proof, called a witness who testified that he delivered to the company some affidavits and some clippings from newspapers and letters between third parties, all of which the company produced. The plaintiff put in evidence the affidavits only, and the court refused either to require him to put in the others, or to allow the company to do so. Exception was taken on this ground, and the court on appeal held[3] that the plaintiff had no right to use on the trial a part only of the means by which she had sought to make out the preliminary proof.

§ 371. **Admissibility of Declarations of the Insured.**—The decisions upon the question of the admissibility of declara-

[1] Hodsdon v. Guardian L. Ins. Co. 97 Mass. 144.

[2] Briggs v. McCullough, 36 Cal. 542.

[3] Cluff v. Mut. Ben. L. Ins. Co. 99 Mass. 317. As to the effect of statements in the proofs as estopping the assured, see *ante*, § 265.

tions alleged to have been made by the insured in cases where he was not otherwise a party to the contract are conflicting.[1]

In a modern case in Connecticut, in an action by a husband on his wife's life, letters of the insured, written a few days before the application was made, in which she spoke of her health, were held admissible to contradict the statements of the application. The court say,[2] "It is claimed that the court erred in admitting in evidence certain declarations and letters of Mrs. Kelsey, made and written about the time the policy was issued. In her application for the policy, she had represented herself in her usual state of health, as having never had any disease except a slight bronchial difficulty in the winter, nor any serious illness or local disease, nor any disease tending to impair her constitution, and that when she had any medical attendant it was Dr. Hawley. And the declarations and letters received in evidence tended strongly to contradict these statements. The claim of the defendants was that the statements in the application were untrue, and known to be so by the plaintiff, and that the policy was therefore obtained by fraudulent representations in respect to Mrs. Kelsey's health; and these declarations and letters, contradictory to her statements in the application for insurance, were received for the purpose of proving the fraud. The ruling on this point is fully sustained by the case of Aveson v. Lord Kinnaird.[3] That was also an action on a life policy on the plaintiff's wife, and, as in this case, the wife had made representations in her application for the policy in regard to her health which were allowed to be disproved or contradicted by her subsequent declarations to a witness. The difference between the two cases in this respect seems to be, that in the case in East, the declarations proved were made shortly after she had made her statement to a medical man in order to procure a health certificate, while in the case under consideration the declarations and letters were made

[1] 10 Allen, 213. [2] Kelsey v. Univ. L. Ins. Co. 35 Conn. 225. [3] 6 East, 188.

and written just before or not long before her statement in the application for insurance. But this surely is unimportant, since it is equally competent to prove the condition of the life insured before and after the time of the insurance, with a view to show what its condition was at that time. And all that is required is, that the declarations and acts proved should not be so remote from the time as to shed no light on the health of the party at the time. One important ground upon which such declarations are received is, that they are part of the *res gestæ.* The subject of inquiry is the health of the person whose life is insured at the time the insurance is effected, and no one can have so perfect knowledge of that as the person himself. Medical men always arrive at their conclusions in respect to health by information in part derived from what their patients say; and what is said by them under circumstances which preclude any suspicion of collusion, is as fairly a part of the *res gestæ* in respect to health as symptoms learned from other sources." In a case cited in Ellis on Insurance,[1] some letters written by the insured shortly before and after the insurance was effected having been given in evidence, detailing the state of her health, which she considered very bad, and stating in one of them "that her health was entirely gone and her constitution quite undermined," the Chief Justice interposed and asked the plaintiff's counsel if he could get over the declarations in the letters, and as a result there was a nonsuit. These cases were decided in a measure upon the earlier case of Aveson v. Kinnaird,[2] in which it was held in an action by the husband upon a policy of insurance on the life of his wife, that declarations by the wife made by her to an acquaintance when lying in bed, apparently ill, stating the bad condition of her health at the period of her going a few days before to be examined by a surgeon, and to get a certificate from him of good health preparatory to making the insurance, and her apprehensions that she could not live ten days

[1] Edwards v. Barron, p. 123.

[2] 6 East, 188. See Stobart v. Dryden, 1 M. & W. 615.

longer, by which time the policy was to be returned, were admissible in evidence to show her own opinion, who best knew the fact, of the ill state of her health at the time of effecting the policy, which was on a day intervening between the time of her going to be examined and the day on which such declarations were made. The plaintiff had called the surgeon as a witness to prove that she was in a good state of health when examined by him, and the fact that his judgment was formed in part from the satisfactory answers given by her to his inquiries, made the evidence undoubtedly admissible, even if it were not so otherwise.

§ 372. Where a policy was for the benefit of a wife, it was held [1] that the admissions of the husband, who was the insured, made after its issue, were not competent evidence. They were the declarations of a stranger, who was neither a party to the action nor at the time of making them the agent of a party. "They are not the declarations of a sick person in relation to his condition at the time of making them, for they relate to transactions and a state of facts long past. They were not admissions against interest, for they could injuriously affect only his wife's separate property. They were not the statements of one who had been a witness on the trial, offered to impeach his credit, but were offered and excluded merely as proof of the facts claimed to have been thus stated. It may be true that these were the declarations of the person who best knew the facts of the case; but whatever weight this consideration might properly give to competent evidence, it cannot remove the objection to its competency. Coming from the witnesses through whom it was offered, it was still mere hearsay. Nor do the declarations become competent because made by a person deceased, and who cannot therefore be produced as a witness upon the trial. This circumstance alone, however unfortunate for a party, will never convert hearsay into competent evidence. And it cannot be claimed that from the mere relation of husband and wife, a feme

[1] Fraternal Mut. L. Ins. Co. v. Applegate, 7 Ohio State, 292.

covert is bound in respect to her separate property by the admissions or declarations of her husband. * * The declarations[1] were regarded as a species of cross-examination, and as statements made by a sick person in relation to the condition of her health at the time of making them. Besides, the authority of that case has not been acquiesced in."

The same view has been taken in a more recent case in Kansas. The court say:[2] "The contract is between the assured and the insurer. The parties are the same whether that which is insured is a human life or a building. There is this difference, that the life being active can by its conduct affect the contract even so far as to annul it, while the building, being inanimate and passive, has of itself no such power, but aside from this, the rights and liabilities of the parties to the contract are the same. The party insured is not party to the record, and therefore her declarations are not admissible on that ground; she is not a party in interest, as the whole benefit and interest inures to the assured; she is not the agent and authorized to speak for him, nor does she come within any other rule by which her declarations can be received against him. * * In the case of Aveson v. Lord Kinnaird, the declarations made intermediate the application and the contract were admitted, and in Kelsey v. Universal Life Ins. Co., declarations shortly prior to the application were received. In both cases however they were considered by the courts as being so near the application as to be properly a part of the *res gestæ;* and in the first case Lord Ellenborough spoke of it as perhaps proper as a sort of cross-examination of the statement made to the medical man. While it may well be doubted whether the reasons given for these two decisions are good, still they in no wise conflict with the well-settled principles upon which the other cases were, and this must be decided." In a case where an action was brought on an accident policy, the Supreme Court passed upon the question of the admissibility

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[1] In Aveson v. Kinnaird, 6 East, 188; *ante*, § 371.

[2] Washington L. Ins. Co. v. Haney, 10 Kans. 525; s. c. 2 Ins. Law Jour. 283.

of the declarations of the assured, as to the injuries he had suffered, and the mode in which they were incurred. They held that the declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. So is a declaration made by a deceased person, contemporaneously or nearly so, with a main event by whose consequence it is alleged that he died, as to the cause of that event. Though generally the declarations must be contemporaneous with the event, yet where there are connecting circumstances, they may, even when made some time afterwards, form a part of the whole *res gestæ*. Where the principal fact is the fact of bodily injury, the *res gestæ* are the statements of the cause made by the injured party almost contemporaneously with the occurence of the injury, and those relating to the consequences made while the latter subsisted and where in progress.

In accordance with this view it has been held that statements as to his health, made by the insured some months prior to the insurance, to persons other than the company or the physician, were not admissible.[1] So it is held, in an action upon a policy upon the life of a debtor in favor of a creditor, that the previous declarations of the debtor as to his habits are mere hearsay and inadmissible,[2] and his statements after the issue of the policy are equally inadmissible.[3] In an action upon a policy, obtained by a third party, containing a warranty as to the age of the insured, it was held that after the death of the insured his unsworn declarations as to his age, made several years before the date of

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[1] Swift v. Mass. Mut. L. Ins. Co. 2 N. Y. Supreme R. 303. See also Reed v. N. Y. Central R. R. Co. 45 N. Y. 574.

[2] Rawls v. Am. Mut. L. Ins. Co. 36 Barb. 357.

[3] *Ibid.* 27 N. Y. 282.

the policy, were not admissible to prove the warranty complied with. The court say that the insured could not possibly know of his own knowledge the time of his birth.[1]

The views adopted in the cases cited from Ohio and Kansas seem most in accordance with correct principles. If the declarations offered to be proved are at or about the time of the insurance, there is some plausibility in the argument in favor of their admissibility, though it is rather a forced argument to urge that such declarations are part of the *res gestæ*, only because they were nearly or quite coincident in point of time. If the question is as to the knowledge of the insured as to his condition, it would seem proper to apply the rule more liberally.

§ 373. **Other Declarations.**—Where a person gave a certificate that the insured had no disease or infirmity tending to shorten life, it was held that his statement to the contrary could not be proved, he not having been a party when the statements were made, though it seems to have been conceded that it would be admissible in England.[2] Where the company in their answer had alleged that certain persons had in the papers which constituted the application made statements contrary to their opinions and to what they believed to be true, it was held competent to ask them whether their opinions and belief were, in fact, as stated in the application.[3] Where a witness testifies as an expert to matters of opinion he may be impeached by showing that upon a former occasion he had expressed a different opinion.[4] Where one of the defenses was the alleged suicide of the deceased, and the evidence showed that he died of poison within a few hours after the policy was issued, it was held that his declarations, made several months before his application, that he intended to effect an insurance upon his life, were inadmissible to

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[1] Westropp v. Bruce, Batty, (Ir.) 155.

[2] Promoter L. Ins. Co. v. Barrie, 5 Murray (Sc.), 135.

[3] Rawls v. Am. L. Ins. Co. 36 Barb. 357; s. c. 27 N. Y. 282.

[4] Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 215; s. c. 1 Ins. Law Jour. 25; Patchin v. Astor Mut. (M.) Ins. Co. 3 Kern. 268; Sanderson v. Nashua, 44 N. H. 492.

rebut evidence tending to show that the insurance was effected with a view to suicide.[1]

Where an endowment policy was payable "to the said assured, or in case of prior decease, to his heirs or representatives," and evidence was offered of his subsequent oral declarations that he intended the policy for his son, it was held that such declarations were inadmissible to vary the contract, and were not sufficient to constitute a trust.[2]

Where the question was whether a man killed himself or was killed by another, it was held[3] that a declaration that the insured had shot himself, made by a man who was found coming from the room in which a pistol shot had been heard a moment before, and in which the insured was found dead from a pistol shot, was properly received, the declaration being part of the *res gestæ* of the event under investigation, and the declarant being dead.

§ 374. **Effect of Certain Evidence.**—Where a warranty that the insured had at the time of insurance no chronic disease, was claimed to have been broken, it was held[4] that a *post mortem* examination made fifteen hours after death, which revealed the fact that he died of inflammation of the intestines and ulceration, was not evidence that he was afflicted with those disorders four months before, at the time of insuring, though the physicians expressed the opinion that the disorders were of long standing; especially where there was evidence that he was examined before being insured by the company's physician, and accepted, and had been seen daily for some months before, and appeared to be in perfect health. The favorable report of the company's examining physician is an element for the consideration of the jury, but is not conclusive or binding on the defendant.[5] Evidence that a premium was paid greatly in excess of the

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[1] Hartman v. Keystone Ins. Co. 21 Penn. 466.
[2] Wason v. Colburn, 99 Mass. 342.
[3] Newton v. Mut. Ben. L. Ins. Co. 2 Dillon, 154.
[4] Murphy v. Mut. Ben. L. & F. Ins. Co. 6 La. Ann. 518.
[5] Scoles v. Univ. L. Ins. Co. 42 Cal. 523.

ordinary rate is not admissible to show that the life insured was not considered a good one.[1]

§ 375. **Parol Evidence Inadmissible to Vary Terms of Contract.**—A verbal agreement made contemporaneously with the execution of the policy, varying some of its terms, cannot be shown. It comes within the rule which excludes parol evidence to vary the terms of a written contract.[2] So where death from "epidemics" was excepted from the risk covered by a permit, it was held[3] that evidence was inadmissible of a conversation had at the time the permit was issued, the object being to show what the word was intended to mean. But the rule does not prevent parol evidence being given to explain an ambiguity as to the person intended to be benefited,[4] nor to show that though the policy was by its terms to take effect on a day named, it did not so take effect for want of delivery or failure to comply with some condition precedent, or for some other cause.[5] In one case,[6] evidence was admitted to prove that a policy was a reinsurance, and thereby to make the date of the commencement of the risk anterior to the date of its issue. So where a policy was expressed to be "executed and delivered," but, in point of fact, it was never delivered, it was held competent to prove by parol that the agreement was that it should issue only on the surrender of another policy, which not only was never surrendered, but was enforced and paid. The evidence did not go to contradict a completed agreement, but only to show there never was any completed agreement.[7] In an action to reform a policy, evidence of conversations prior to its issue is admissible.[8] Parol evidence is admissible to show that a written assignment of a policy was intended as collateral

[1] Lindenau v. Desborough, 3 C. & P. 353.
[2] Lamatt v. Hudson Riv. F. Ins. Co. 17 N. Y. 199, note.
[3] Pohalski v. Mut. L. Ins. Co. 45 How. 504; affirmed in Court of Appeals.
[4] Clinton v. Hope (F.) Ins. Co. 1 Ins. Law Jour. 436, N. Y. Ct. of Appeals.
[5] Atlantic (F.) Ins. Co. v. Goodall, 35 N. H. 328.
[6] Phila. L. Ins. Co. v. Am. L. & Health Ins. Co. 23 Penn. 65.
[7] Faunce v. State Mut. L. Ass. Co. 101 Mass. 279.
[8] Globe (F.) Ins. Co. v. Boyle, 21 Ohio St. 119.

security for a debt which has been subsequently paid, and that therefore the original party can maintain the action without procuring a reassignment.[1]

Where a note, absolute on its face, payable at a stated time, was given in part payment of the premium upon a policy in a mutual company, it was held[2] that it might be shown that it was such premium note, and that the company could only collect it under its charter by making an assessment upon all notes to meet losses, and that the fact that the insured had allowed his policy to expire by non-payment of subsequent premiums gave no right to collect it otherwise.

Where it is alleged that the insurance was obtained by one person, but really for another, in fraud of the statute requiring the name of the person interested to be stated in the policy, any evidence is admissible which tends to show that a person other than the nominal one was the assured.[3]

§ 376. **When Language of Policy may be Contradicted or Explained.**—The policy usually contains an acknowledgment of the receipt of the first premium. This acknowledgment may be contradicted or explained. In any case, the delivery and possession of a policy, containing a receipt for the premium, affords evidence of its payment, or of a waiver of its prepayment, but it is not conclusive, nor does it operate as an estoppel, either in favor of or against the insurers.[4]

In an English case,[5] the Court of Queen's Bench were singularly divided upon some questions. Erle, J., held that

[1] Summers v. U. S. Ins. An. & Trust Co. 13 La. An. 504.

[2] Mut. Ben. L. Ins. Co. v. Jarvis, 22 Conn. 133.

[3] Shilling v. Accidental Death Ins. Co. 1 F. & F. 116.

[4] Sheldon v. Atlantic F. & M. Ins. Co. 26 N. Y. 460; Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283, reversing same case below, 6 Rob. 693; s. c. 37 How. 126; 6 Abb. N. S. 144; also, Thompson v. Am. Tont. L. Ins. Co. 46 N. Y. 674; Miller v. Brooklyn L. Ins. Co. 12 Wall. 285; Troy F. Ins. Co. v. Carpenter, 4 Wisc. 20; Bergson v. Builders' (F.) Ins. Co. 38 Cal. 541. The contrary is held in Illinois. Ill. Cent. (F.) Ins. Co. v. Wolf, 37 Ill. 354; Prov. L. Ins. Co. v. Fennell, 49 Ill. 180. Madison (F.) Ins. Co. v. Fellows, 1 Disney, 217, and Robert v. N. E. Mut. L. Ins. Co. *Ib.* 355, are to the same effect as the Illinois cases, but are overruled by the decision to the contrary in the latter case on appeal, 2 Disney, 106.

[5] Foster v. Mentor L. Ass. Co. 3 El. & Bl. 48; s. c. 24 Eng. Law & Eq. 103.

where the assured had acted upon a policy, which recited that there was a certain declaration of health, he was concluded from denying that there was such a declaration; while Wightman, J., thought that, though he was not concluded, he had made it very weighty evidence against him, which should have been strongly urged upon the jury by the court; and Coleridge, J., thought that, as the recital in the policy was only by the company, the assured was not concluded by it; and, finally, Campbell, C. J., thought that it was a question of intention, and if there was an intention to represent that there was such a statement, there would have been an estoppel, but that, if there was no intention so to declare, the recital by the insurer did not estop the assured.

Where the company relied upon the fact that the assured subsequently accepted and kept a renewal receipt which expressed upon its face that the renewal was conditioned upon the good health of the assured at the time such receipt was given, it was not error to admit evidence for the plaintiff tending to show that the true character of the receipt was for a time concealed from the assured on account of his critical condition, and that, as soon as it was communicated to him he refused to accept it, and directed it to be sent back. These facts are admissible in evidence as a part of the *res gestæ*.[1]

§ 377. **When Evidence of Custom is Admissible.**—Arnould[2] lays down the following rules as to the admissibility of proof of custom. Every usage of a particular trade, which is so well settled or so generally known that all persons engaged in that trade may be fairly considered as contracting with reference to it, is considered to form part of every policy designed to protect risks in such trade, unless the express terms of the policy decisively repel the inference. The usage, moreover, in order to be binding, must be either a general usage of the whole mercantile world, or a particular usage of uni-

[1] Rockwell v. Mut. L. Ins. Co. 27 Wisc. 372.

[2] Insurance, 65, *et seq.* as stated May on Ins. 187.

versal notoriety in the trade upon which, and of the place at which, the insurance is effected; the usage of a particular place, or of a particular class of persons, cannot be binding on non-residents, or on other persons, unless they are shown to be cognizant of it. Where the sense of the words and expressions used in a policy is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage their meaning in the given case. A resort to parol evidence, however, is only permitted where the language of the policy is either obscure or equivocal; such evidence will never be admitted to set aside or control its plain and unambiguous terms.[1]

In accordance with these rules it has been held that if the custom of a particular company is sought to be proved, knowledge of it must be brought home to the assured in order to render it admissible.[2] A custom not to pay the whole amount of the loss in a case of reinsurance cannot be shown;[3] but evidence has been admitted to show that in such cases the warranty on the part of the reinsured refers to the state of health at the time of the original insurance.[4] In a case in Georgia[5] a prospectus was offered in evidence as showing a custom of the company not to require payment of premiums on the day stipulated in the policy, but the court held that a usage was only provable when terms are used in a policy or representation which have by usage acquired an affirmative commercial sense, and where there is an ambiguity in the words used, but that when the parties have expressed their meaning clearly they are to be considered as agreeing to be bound accordingly, and as having expressly

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[1] See Howell v. Knickerbocker L. Ins. Co. 44 N. Y. 276; Robertson v. Money, Ry. & Mood. 75; Uhde v. Walters, 3 Campb. 16; Gabay v. Lloyd, 3 B. & C. 793; Astor v. Union (M.) Ins. Co. 7 Cow. 202; Coit v. Comm. (M.) Ins. Co. 7 Johns. 385; Eager v. Atlas (M.) Ins. Co. 14 Pick. 141; Mut. Safety (F.) Ins. Co. v. Hone, 2 Comst. 235.

[2] Taylor v. Ætna L. Ins. Co. 13 Gray, 434; Adams v. Otterback, 15 How. 539; Schwarz v. Germania L. Ins. Co. 18 Minn. 448; s. c. 2 Ins. Law Jour. 449.

[3] Mut. Safety F. Ins. Co. v. Hone, 2 Comst. 235.

[4] Foster v. Mentor L. Ass. Co. 3 E. & B. 48, 56.

[5] Mut. Ben. L. Ins. Co. v. Ruse, 8 Geo. 534.

excluded all *aliunde* facts, circumstances and usages, and that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them.[1] So where the application fixed the time for the contract to take effect, evidence was held inadmissible to show a custom on the part of the company that its policies should take effect at a different day.[2]

On the other hand, in a case in Pennsylvania, the plaintiff offered on the trial to prove a custom among life insurance companies, to allow thirty days' grace for payment of premiums due, even where a clause of forfeiture for non-payment on the day exists. The court on appeal say:[3] "It might have been a difficult thing to prove such a custom, but that was not a good ground on which to refuse the offer. It was the plaintiff's right to prove it if she could, and we are to take it, for the purposes of this investigation, that she could have proved it. Would it have been efficient proof for any purpose had it been admitted? We think it would, although generally a contract is the law of the transaction in which it exists, and is not to be affected by anything but its terms, that is to say, it cannot be abridged or enlarged in itself by anything else; yet there are many cases in which its execution is materially curtailed by usage or custom. * * The offer in this case was to curtail the generality of the clause of forfeiture in the policy in case of non-payment of the premiums at the day, and to show that a forfeiture was not demandable at the day, nor at all, if paid within thirty days. If the plaintiff could have established this as a custom, her case would on this point have been clear of difficulty. * * We do not know whether there is or is not such a custom. That is not our question at this time; the plaintiff offered to prove

[1] See also N. H. Mut. F. Ins. Co. v. Rand, 4 Fost. 428; Swamscot Machine Co. v. Partridge, 5 Fost. 369; Illinois Mut. F. Ins. Co. v. O'Neile, 13 Ill. 89.

[2] Winnesheik (F.) Ins. Co. v. Holzgrafe, 53 Ill. 516.

[3] Helme v. Phila. L. Ins. Co. 61 Penn. 107.

it, and the offered testimony should have been admitted, in our opinion."[1]

Evidence that an agent frequently waived the condition of prepayment is not admissible to raise an inference of waiver in a particular case, in the absence of other proof tending to establish it,[2] and even if evidence of a custom of the company to receive payment of the premiums overdue were admissible generally, it was not so where the payment was after the death of the insured.[3] A usage of the company to require particular proof of death cannot bind the insured unless he knew of it when he took the policy or it was expressly required by it.[4] A well established custom among life insurance companies and their agents as to the kind and extent of property that agents may possess in the lists of policies they procure may be considered as explaining the contract, because the parties are presumed to make the contract in reference to that custom.[5] Where the defense was that a habit of dram drinking was concealed in the application, it was held that it was incompetent to ask whether the party was reputed a dram drinker. The only way such evidence can be got at is to prove the number of drams he took, and then ask a medical man what effect they would have.[6]

§ 378. **Testimony of Experts.**—In cases of life insurance the testimony of experts is admissible to some extent and often becomes indispensable. It has been held that where a fact concealed was some bodily infirmity, it was competent to allow physicians to state their opinions whether the infirmity was calculated to shorten the life of the insured.[7] So the opinion of a physician is competent evidence

[1] See *contra*, Mut. Ben. L. Ins. Co. v. Ruse, 8 Geo. 534.

[2] Wood v. Poughkeepsie Mut. (F.) Ins. Co. 32 N. Y. 619; Burger v. Farm. Mut. (F.) Ins. Co. 3 Pittsb. Leg. Jour. 4; *ante*, § 190.

[3] Sullivan v. Cotton States L. Ins. Co. 43 Geo. 423.

[4] Taylor v. Ætna L. Ins. Co. 13 Gray, 434.

[5] Ensworth v. N. Y. L. Ins. Co. U. S. Circuit, North. Dist. of Ohio, 7 Am. Law Reg. N. S. 332; *ante*, § 314.

[6] Promoter L. Ins. Co. v. Barrie, 5 Murray (Sc.) 135.

[7] Hartford Prot. (F.) Ins. Co. v. Harmer, 2 Ohio St. 452. A very carefully considered case.

as to the cause of death.[1] But where the meaning of the term used is free from ambiguity, expert testimony is not admissible to assign a meaning to it. Thus where a permit excepted death from epidemics, it was held that evidence could not be admitted in order to show that yellow fever is properly classified in medical science and knowledge as belonging to diseases called epidemics, for the permit having been reduced to writing, it must be taken to be the repository and evidence of the final intention and understanding of the parties.[2] Where the defense was a misrepresentation in the statement of the occupation of the deceased in the application, by which it was stated to be that of a farmer, while his real occupation was alleged to be that of a slave-catcher, it was held that the testimony of the company's clerk that he considered slave-catching a dangerous business, and that a risk would not be taken at any premium on the life of one known to be so engaged, is admissible; though there was nothing in the printed rates of premium to show that persons of this class were considered hazardous subjects. The court say:[3] "The mere opinion of a witness who knows no more about the subject than the jury, and who undertakes to draw from facts already proved deductions which they can make as well as he, is not admissible. * * How far the effect which a particular fact ought to have on the risk or the premium may be proved by witnesses conversant with the business, is a vexed question. But though the cases conflict seriously, I think none of them go so far as to say that one who knows the practice, not only of the particular office, but of insurance offices generally, may not give his opinion of the influence which a given fact would have had as an element in the contract. Certainly this is the opinion supported by the strongest authority and the best reasons." On the other hand, it has been held[4] that evidence is inadmissible to

[1] Miller v. Mut. Ben. L. Ins. Co. 31 Iowa, 216; s. c. 1 Ins. Law Jour. 25.
[2] Pohalski v. Mut. L. Ins. Co. 45 How. 504; affirmed in Ct. of Appeals.
[3] Hartman v. Keystone Ins. Co. 21 Penn. 466.
[4] Summers v. U. S. Ins. An. & Trust Co. 13 La. An. 504.

show that the company would not have insured the life at the rate taken if it had known he would have been subjected to the risk of a voyage on a steamboat, there being no condition in the policy against such a voyage. In a very elaborate Irish fire insurance case, it was held that the testimony of the secretary of an insurance company, that from his experience as an officer of the company, he could say that, if certain facts had been communicated to the company, the premium would have been different, was admissible.[1] But it has also been held that experts cannot be admitted to testify as to the effect of certain facts in increasing the proper premium[2] or the risk,[3] nor as to the materiality of certain facts to the risk;[4] but while an expert cannot be permitted to testify whether "leaving a dwelling-house unoccupied for a considerable length of time" is an increase of the risk, the question whether such leaving unoccupied is material to the risk may be tested by the question whether underwriters generally would in such case charge a higher premium.[5] The first question was said to be as to a subject within common knowledge as to which opinions were inadmissible, while the latter related to a matter which was within the peculiar knowledge of persons versed in the business of insurers. "The distinction, though fine, seems to be sound; it is between an inadmissible opinion and an admissible fact. The inference of increased risk, based upon the fact known to him of a higher rate of premium in such cases cannot be stated by the witness; but he may state the fact which is to him a matter of special knowledge, and from which the jury may draw the inference of increased risk."[6] Questions propounded at the trial to the physician who examined the applicant for insurance as to the effect which assumed facts

[1] Quin v. Nat. Ass. Co. Jones & Cary (Ir.) 316; s. c. 5 Irish Law Rec. N. S. 267.

[2] Joyce v. Maine (F.) Ins. Co. 45 Me. 168.

[3] Luce v. Dorchester Mut. F. Ins. Co. 105 Mass. 298.

[4] Jefferson (F.) Ins. Co. v. Cotheal, 7 Wend. 72; Hartford Prot. (F.) Ins. Co. v. Harmer, 2 Ohio State, 452. But see Kern v. South St. Louis Mut. F. Ins. Co. 40 Mo. 19; Schenck v. Mercer Co. Mut. F. Ins. Co. 4 Zab. 447.

[5] Luce v. Dorchester Mut. F. Ins. Co. 105 Mass. 298.

[6] May on Ins. 720.

would have had upon the witness' action and judgment, were held [1] to be properly excluded. They did not call for the opinion of the witness in a matter of science connected with his profession, or the bearing of the condition and habits attributed to the assured upon the risk assumed by the contract. The law presumes that a policy of insurance is based upon the application, and hence it is not error to reject the testimony of the officers of the company that the policy was issued in the belief that the statements in the application were true, and would not have been issued if any of them had been known to be untrue.[2] How far any false statements affect the validity of the contract is a question of law for the court and not one to be settled by the opinion of either party. It is not competent to ask a physician whether a person in the habitual use of intoxicating liquors is an insurable subject. However eminent as a physician, he might have very little knowledge as to what kind of persons insurance companies might properly venture to insure. And even if he had been in the business and practice of insuring lives, the evidence would have been incompetent, as being in effect only an opinion as to what insurers of lives ought to do in certain cases. So a general offer to prove by experts in the business of life insurance that a person so addicted would not be considered an insurable subject is admissible. The inquiry did not relate to matters of science or skill.[3]

§ 379. In a recent case in New York some of the limitations upon expert testimony are stated.[4] "Another con-

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[1] Higbie v. Guardian Mut. L. Ins. Co. 53 N. Y. 603; s. c. 2 Ins. Law Jour. 761; Durrell v. Bederly, 1 Holt, N. P. C. 283. But see Walton v. Nat. Loan Fund L. Ass. Soc. 17 Abb. 72; *ante*, § 50.

[2] Washington L. Ins. Co. v. Hanly, 10 Kans. 525; s. c. 2 Ins. Law Jour. 283.

[3] Rawls v. Am. L. Ins. Co. 36 Barb. 357; s. c. 27 N. Y. 282. See *ante*, § 265. As to the opinion of insurers as evidence, see Jefferson (F.) Ins. Co. v. Cotheal, 7 Wend. 72; Schenck v. Mercer Co. Mut. (F.) Ins. Co. 4 Zab. 447; Hartford Prot. (F.) Ins. Co. v. Harmer, 2 Ohio St. 452; Joyce v. Maine (F.) Ins. Co. 45 Me. 168; Merch. & Man. Mut. (F.) Ins. Co. v. Wash. Mut. Ins. Co. 1 Handy (Ohio), 408; Kern v. South St. Louis Mut. (F.) Ins. Co. 40 Mo. 19.

[4] Higbie v. Guardian Mut. L. Ins. Co. 53 N. Y. 603; s. c. 2 Ins. Law Jour. 761. In this case a question was raised, but not decided, as to the admissibility of non-expert

dition was, however, wanting to make the proposed testimony of the witness competent, viz., knowledge by the witness of the facts necessary to enable him to give an opinion in the particular case. Science and skill, without a knowledge of the facts essential to a correct application of them, are of no value to an expert as a witness. To make the opinion of a medical gentleman as to the character and nature of the ailment of an individual evidence, he must have a knowledge of the circumstances and conditions essential to a right understanding of the matter upon which his opinion is asked. In the cases in which the opinion of experts has been admitted, the courts have held that the witnesses have had the requisite skill and learning, as well as a sufficient knowledge of the particular subject in regard to which they were called to testify.[1] This does not exclude opinions of experts based upon facts proved by other witnesses. But the facts necessary to the formation of a correct opinion must in all cases be known to the witness or proved by others, and they must be such as enable him, by the right use of his skill and learning, to answer intelligently the questions put. Opinions are only admissible in evidence when founded on the personal observation of the witness, or facts as proved by other witnesses. It was the opinion of Dr. Duran as a gentleman skilled in medicine only, that was admissible, and when he testified that he had not sufficient knowledge to enable him to form or express a medical opinion as to the cause or character of the headaches of the assured, the court properly excluded evidence of the impressions made upon his mind by casual intercourse with him. Opinions are only admitted in evidence as a matter of necessity, and in cases in which the observation and experience of ordinary persons will not

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testimony to prove insanity. It was held, however, that persons of ordinary understanding are competent to form an opinion whether one whom they have opportunity to observe appears to be sick or well at the time.

[1] Swan v. Middlesex, 101 Mass. 173; Bedell v. Long Island R. R. Co. 44 N. Y. 367; State v. Hinkle, 6 Iowa, 380.

enable them to draw correct conclusions from the particular facts. It would be dangerous in the extreme to permit the surmises and conjectures of experts to go to a jury as important evidence. Experts may give opinions based on facts, not on conjecture.

"The plaintiff, under objection by the defendant, was permitted to ask medical witnesses questions based upon the report of the medical examiner of the assured to the defendant, and which had been verified by him as a witness, and also upon the hypothesis that the assured had at the time of the insurance been afflicted with severe attacks of headache, as alleged by the defendant, and in support of which allegations evidence had been given. The witnesses testified that the results of the examination detailed by the examiner indicated unusually good health in the subject; that they would not expect to find such physical health in a person who had had oft-repeated severe attacks of headache—that is, that the state of health indicated by the reported examination was inconsistent with a functional derangement as claimed and alleged by the defendant. The evidence was unobjectionable. The physical condition and state of health of the assured at the time of the application was directly in issue, and any evidence tending to show that he was then in sound health and a proper subject of insurance, was competent. All persons of ordinary understanding are competent to form an opinion, whether one whom they have opportunity to observe appears to be sick or well at the time. Medical men of skill and experience are not necessarily restricted to their own observation, but may give an opinion based upon facts proved by others, or upon hypothetical cases, when pertinent to the issue, and evidence has been given tending to prove the facts assumed."

§ 380. **Admissibility of Evidence in Certain Cases.**—Where a witness stated that he delivered preliminary proofs, and stated the time and place, it was held[1] that this was sufficient

[1] Hincken v. Mut. Ben. L. Ins. Co. 50 N. Y. 657; s. c. below, 6 Lans. 21.

to justify the jury in finding that the condition of the policy had been complied with; the proofs being in defendant's possession, and it not having accounted for or produced them; and having received and retained them, as far as appeared, without objection, it would not be assumed that they were defective. All the papers on which the company acted when it decided to grant the policy are admissible.[1] Where the policy refers to the application as forming a part of it, it is inadmissible without the application.[2] Where the company defended on the ground of fraudulent concealment and misrepresentation, it was held that the plaintiff was entitled to an inspection of the statements made by the referees and the report of the physician who examined the insured, though the report was expressed to be "confidential," because "the company cannot be privileged from producing a report made by their officer upon which they acted in granting the insurance."[3] Where the question is as to the power to remit forfeitures, the charter and by-laws are admissible.[4] Where the defense was that the death was caused by suicide, it was held incompetent to show that the deceased was an atheist or an infidel.[5] Where the defense was that the deceased died in the violation of a known law, it was held that the record of a court, showing the acquittal of the person who killed him, was not competent evidence. There was no privity of parties, or identity of issue. The acquittal of the slayer could not establish that the party slain was guilty of a crime, but only that the slayer was excused by circumstances of provocation.[6] Where there were three claimants to the money, payable under a policy issued by a Connecticut company, upon the life of a person who died in New Orleans, one of the parties brought suit in Connecticut, and the company

[1] Rawls v. Am. Mut. L. Ins. Co. 27 N. Y. 282.

[2] Lycoming Mut. (F.) Ins. Co. v. Sailer, 67 Penn. 108; Drullard v. Am. Pop. L. Ins. Co. MSS. Superior Court of Buffalo; Rogers v. Charter Oak L. Ins. Co. MSS. See *ante*, 365.

[3] Mahoney v. Nat. Widows' L. Ass. Fund, 6 L. R. C. P. 252.

[4] Koelges v. Guardian L. Ins. Co. 2 Lans. 480; s. c. 9 Abb. N. S. 91.

[5] Gibson v. Am. Mut. L. Ins. Co. 37 N. Y. 80.

[6] Cluff v. Mut. Ben. L. Ins. Co. 99 Mass. 17; *ante*, § 214.

interpleaded all parties, but only two of the three appeared, the third person being out of the jurisdiction. He afterwards brought a suit in Louisiana, and it was held that, though the judgment in Connecticut was not *res judicata*, it was admissible in order to show that the company had paid the money to the proper party.[1] Where an accident policy covered all accidents, making no exception of any particular occupation, it was held that evidence was inadmissible to show that the occupation of the insured was different at the time the insurance was procured from what it was when the accident occurred.[2] The name of a company, as "The Pacific Mutual Life Insurance Company, of California," raises no presumption that the company is a corporation rather than an association, or that, if a corporation, it was created under the laws of that state.[3]

§ 381. New York has a peculiar statute which forbids a physician to disclose any information which he may have acquired in attending any patient in a professional capacity. Though passed for a very different purpose, it is claimed that its terms cover the case of a physician referred to by the applicant, and also the physician who attends during the final illness. No reported case has passed upon this statute as applicable to life insurance, but in an unreported case at *nisi prius*,[4] objections to evidence based on this statute were overruled. The defendant took the ground that the statute merely established a privilege which might be waived by the patient,[5] and that by referring the court to the physician for information he had waived his privilege; that since the change in the law so as to allow parties to be examined, the reason of the statute ceased to exist.[6] It was urged, moreover, that the privilege was personal to the patient, and

[1] Wood v. Phœnix Mut. L. Ins. Co. 22 La. Ann. 617.
[2] Provident L. Ins. Co. v. Fennell, 49 Ill. 180.
[3] Briggs v. McCullough, 36 Cal. 542.
[4] Edington v. Mut. L. Ins. Co. N. Y. Supreme Court, Ontario County.
[5] Johnson v. Johnson, 14 Wend. 637.
[6] Whitney v. Barney, 30 N. Y. 342; *In re* Mitchell, 12 Abb. 249.

could not be availed of by a third party after his death,[1] nor could it at any time be applied to perpetuate a crime or prevent its discovery, or to commit a fraud or prevent its disclosure and defeat.[2] The court held the evidence admissible.[3]

§ 382. **The Admissibility of the Canvassing Documents of the Company.**—The attempt has been made in several cases to vary the provisions of the policy, by construing it in connection with the prospectus or canvassing documents issued by the company, and thus to introduce, substantially, a waiver of some condition of the policy. In England the attempt has succeeded in several cases since the passage of the Common Law Procedure Act of 1854, one section of which allows the interposition of a plea or replication on equitable grounds, and, therefore, in cases where the language of the policy has been pleaded by the company to defeat an action upon it, a replication has been interposed to avoid the effect of the condition.[4] The earliest of these cases was Wood v. Dwarris,[5] where the plea alleged that, by the terms of the policy, it was to be void if any statement in the proposal were untrue, and that, in point of fact, the proposal was untrue in stating that another company had accepted the life. The equitable replication was interposed, that before the issue of the policy the company had issued a prospectus, in which they agreed that all policies should be valid, except in cases of fraud, and that the plaintiff insured relying upon this, that the policy was therefore in equity subject to the terms that it should be indisputable, except for fraud, and

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[1] Allen v. Public Administrator, 1 Bradf. 221; affirmed, Selden's Notes, 87.

[2] Hewitt v. Prime, 21 Wend. 79.

[3] The statute is as follows (2 R. S. 406): "No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon." The same in the city of New York has, at Nisi Prius, admitted similar evidence. Dilleber v. Home L. Ins. Co. not reported.

[4] The language is, that it shall be lawful in any case in which, if judgment were obtained, he would be entitled to relief against such judgment, on equitable grounds, to plead the facts which entitle him to such relief by way of defense. St. 17 & 18 Vict. c. 125, §§ 83 to 86.

[5] 11 Exch. 493.

that the misstatement was not fraudulent. There was a rejoinder, that the policy was made on the basis of the proposal, and that there was no promise that the policy should be indisputable, except in case of fraud. The question came up on demurrer to the rejoinder, and it was held that the rejoinder was bad, and that the replication was a good avoidance of the plea.[1]

In the later case of Wheelton v. Hardisty,[2] there was a similar replication, but an issue was taken upon it, and it appeared that the company had in fact issued a prospectus stating that their policies were indisputable except on the ground of fraud, but there was no express proof that the plaintiffs saw the prospectus or were induced by it to take the policy, though the jury so found, and the Court of Queen's Bench therefore set aside a verdict for the plaintiff. Erle, J., in giving the prevailing opinion, says: "The presumption of the written policy containing the real terms between the parties and the general presumption against fraud, are presumptions against the facts stated in the replication; and the onus of proof was clearly upon the plaintiffs; and

[1] Baron Alderson, in giving his opinion, says: "The plea, in substance, states that the policy was made upon the express condition, that if any statement contained in the proposal were untrue, the policy should be void; and it is averred that a particular statement made in the proposal was untrue. That would have been a perfectly good defense, if the policy had been effected on the terms mentioned in the proposal. But, then, the plaintiff rejoins on equitable grounds, that, before the policy was entered into, the defendants issued a prospectus, by which they represented that all policies effected by them should be indisputable, except in cases of fraud. This was holding out to all the world, that they would require no proof of the truth of the matters stated in the proposal, but would only dispute the claim on the ground of fraud. So that the word 'untrue,' in the proposal, really means 'fraudulent.' When the plaintiff went to their office, the defendants professed to grant him an assurance on those terms, therefore they cannot now set up as a defense, that the statement in the proposal was untrue, unless they add that it was 'fraudulently' untrue, for they have, in fact, said that they will never make any other defense."

Martin, B., says: "No doubt it would be competent for the company to grant a policy upon terms which excluded the prospectus; and if that were so, the defendants would be justified in resisting this action, and might simply have traversed the replication; for the plaintiff is bound to prove, not only that such a prospectus was issued, but also that the policy was made on the terms of that prospectus; and, therefore, if the defendants, instead of rejoining, as they have done, had taken issue on the replication, and, what is now alleged on their behalf be true, they would have obtained the verdict."

[2] 8 El. & Bl. 232; s. c. 3 Jur. N. S. 1169; 5 *Ib.* 14; 26 L. J. Q. B. 265; 27 *Ib.* 241.

according to the principles of equity as laid down in the decisions cited before us in the argument, very distinct proof ought to be given in proof of facts to raise the equity suggested in the replication." In an Irish case[1] it was held that where the policy was expressly made on the basis of the application, and the company pleaded that the latter contained a misstatement as to the age of the insured, an equitable replication averring that he made the statement as to age by reason of information received from the defendants, was good; that the replication showed an estoppel against the defendants, and did not infringe the rule against varying a contract under seal.[2]

§ 383. In this country a similar question arose in Mutual Benefit Life Insurance Co. v. Ruse,[3] where it was contended that though the policy was, by its terms, to be forfeited unless the premium was paid on a day named, yet that a pamphlet issued by the company, but not referred to in the policy, in effect gave thirty days' grace. But the court held that the pamphlet was not admissible in evidence for the purposes for which it was offered. They say: "The position of the plaintiff below is, that this pamphlet, being promulgated as containing the terms and conditions upon which the company insures, they are bound by it, its declarations entering into and constituting a part of their contracts of insurance, and that the meaning and legal effect of the thirty

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[1] Sweeny v. Promoter L. Ass. & Ann. Co. 14 Irish Law, N. S. 476.

[2] In Wheelton v. Hardisty, 8 E. & B. 232, Erle, J., says, "We cannot help adding that we entertain great fear of the effect of equitable replications like the present being allowed to control solemn deeds or instruments in writing. The same effect must be given to mere conversations, as the fact of the supposed inducement being in writing can make no difference;" but Lord Campbell says, in the same case, "A prospectus issued by authority of the insurance company is not like a prior observation of an officer of the company during the negotiation, but is a solemn undertaking on the part of the company. And if the policy really is entered into on the faith of the prospectus, I think that, in equity, the prospectus, although not expressly referred to in the policy, is so far to be considered a part of the contract, that equity ought not to allow a defense to be set up against an undertaking in the prospectus on the faith of which the policy was effected." Among other cases of equitable replication in the English courts are, Reis v. Scottish Eq. L. Ass. Soc. 2 H. & N. 19; Solvency Mut. Guar. Co. v. Freeman, 7 H. & N. 17.

[3] 8 Georgia, 534.

day clause or rule are, that if the premium is paid or tendered at any time within the thirty days, it extends the contract so as to hold them liable for the insurance, even where, as in this case, the insured dies after the time stipulated in the policy for the payment of the premium, and before the tender or payment. I do not mean to say that in no case, and for no purpose, would this pamphlet be admissible. In this case it is inadmissible, because it cannot be construed so as to enlarge or extend the terms and obligations of the contract as contained in the policy. It is to be noted that the policy contains no reference whatever to the pamphlet; of course none to that part of it now being considered. * * Indeed, the plaintiff does not pretend to rely upon the policy alone; his reliance is upon the pamphlet connected with the policy. * * The policy itself is considered to be the contract between the parties, and whatever proposals are made, or conversations had, prior to the subscription, they are to be considered as waived, if not inserted in the policy or contained in a memorandum annexed to it.[1] Whatever is contained in the policy, or written upon it at the time of signing, is a part of the contract, and is adopted by the signature, whether the words are in the margin, or put in by consent after signing, or written transversely, or indorsed. Now, if this policy had referred to this printed pamphlet, it would have become thereby a part of the contract. * * From which affirmative proposition logically it follows that, if the printed proposals are not referred to, they are no part of the contract. * * If this pamphlet is admitted, it is by the invocation of parol testimony. Of itself it proves nothing, as it bears no evidence of being the act of the parties. It is produced as containing the usage by which it is alleged the company is bound. It is set up by parol; its promulgation is proven by parol; and if admitted it is brought to bear upon the policy by the aid of parol evidence. If admitted, it contradicts the express stipulations of the policy."

[1] Higginson v. Dall, 13 Mass. 96.

The same question was presented in a case between the same parties in New York.[1] The Supreme Court of that state, held that the defendants were estopped by their prospectus from insisting upon the default in payment on the day named in the policy. But the Court of Appeals reversed this decision, saying: "The question first to be considered on this subject is, whether the prospectus is to be treated as part and parcel of the contract between the parties. It was not referred to in, nor in any manner annexed to, the policy. Nothing is better settled than that, where two parties have entered into a written contract, all previous negotiations and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement. Such preliminary matter may sometimes be admissible under the rule which admits evidence of the surrounding circumstances for the purpose of explaining an ambiguous expression, but never where the terms of the contract are clear and explicit. The legal inference in all such cases, if the contract varies from what has been previously said or written, is, that the parties, upon further consideration, have changed their views. Policies of insurance are no exception to this rule. * * There is, therefore, not the slightest authority for holding that any preliminary or collateral writing whatever, which is neither annexed to nor referred to in the policy, can be taken as a part of the contract of insurance; and the general principles of law are directly opposed to any such doctrine. But it is contended that if the prospectus is not to be regarded as incorporated into the contract itself, it is nevertheless obligatory upon the company as a representation. Undoubtedly a written or printed statement delivered by the agent of the company to an applicant for insurance, relating directly to the insurance applied for, may amount to a representation on the part of the company; but as a representation merely, the prospectus in this case cannot aid the plaintiff. A representation by the assured, if false, avoids

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[1] Ruse v. Mut. Ben. L. Ins. Co. 26 Barb. 556; on appeal, 23 N. Y. 516.

the policy. Here it is not sought to avoid, but to enforce the policy. The only mode, therefore, in which the prospectus can be made to aid the plaintiff is by treating the company as absolutely bound by its terms to the same extent as if it had been incorporated into the policy. The Supreme Court accomplished this by holding the company estopped by the terms of the prospectus; but this was clearly a misapplication of the doctrine of estoppel. It has never, I think, been held, when the conditions of a contract proposed in the preliminary negotiations between the parties varied from the contract as finally consummated, that, although such conditions form no part of the contract, they may, nevertheless, operate as an estoppel upon the parties. The reasons given why these introductory propositions do not become incorporated into the contract, viz.: that they are presumed to have been subsequently waived or abandoned, conclusively repel all idea of an estoppel in such a case." A motion was subsequently made in the Court of Appeals for a re-argument, when the attention of the court was called, for the first time, to the English cases already referred to. The motion was denied, because the court held[1] that there could on other grounds be no recovery, but they say that those cases "do certainly hold that the prospectus might equitably be regarded as forming part of and controlling the terms of the policy. It is not improbable that an examination of these cases would have led this court to a different conclusion than the one it arrived at upon the point."

In spite of this intimation of the Court of Appeals, it seems very difficult to lay down any principle upon which a prospectus or other document not referred to in the policy,—except the charter of the company,—can be introduced to vary the unequivocal terms of the policy.[2]

§ 384. What are Questions of Fact and what Questions of Law.

[1] 24 N. Y. 653.

[2] As to evidence upon the following subjects, see *ante:* Real Party in Interest, § 17; Materiality, §§ 48, 49, 64; Delivery of Policy, §§ 161 to 170; Time Contract takes Effect, § 173; Presumption as to Death, §§ 204, 205, 206; Proofs of Death as Evidence, § 265.

—It is for the jury to say whether a statement is material, subject to having their verdict set aside, as contrary to evidence, as in other cases;[1] but if the false statement is made in reply to a specific question, its materiality is, as already shown, settled by the contract.[2] The question of concealment, and its materiality, is to be submitted to the jury.[3] To a question of what disease a person died, the answer was, "Unknown." It was held that it should have been left to the jury to say whether this meant "unknown" to the applicant or to any one.[4] Whether or not an agent has authority to dispense with the usual mode of payment and to substitute another, is a question of fact, and not of law.[5]

It is for the jury to say whether a chaplain in the army is in the military service, and whether the assured, if in the military service, was ever actually employed in such service;[6] and also whether certain transactions proved amounted to a refusal to insure.[7]

§ 385. **Construction of Policies.**—The courts will always so construe a policy as to give it effect, rather than to make it void, and nothing but the most stern legal necessity will constrain them to give it a construction which would nullify it. They always hold that the written part shall prevail over the printed part in cases of repugnancy.[8] When the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had

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[1] Huguenin v. Rayley, 6 Taunt. 186; Lindenau v. Desborough, 8 B. & C. 586; Anderson v. Fitzgerald, 4 H. of Ld.'s Cas. 484; s. c. 3 C. & P. 353; Campbell v. N. E. Mut. L. Ins. Co. 98 Mass. 381, 393; Wainewright v. Bland. 1 Mood. & Rob. 481.

[2] *Ante*, § 64; and see Shoemaker v. Glens Falls (F.) Ins. Co. 60 Barb. 84.

[3] Sexton v. Montgomery Co. Mut. (F.) Ins. Co. 9 Barb. 191.

[4] Swift v. Mass. Mut. L. Ins. Co. 2 N. Y. Supreme R. 302.

[5] Sheldon v. Conn. Mut. L. Ins. Co. 25 Conn. 207.

[6] Mut. Ben. L. Ins. Co. v. Wise, 34 Md. 582; s. c. 1 Ins. Law. Jour. 433.

[7] *Ibid.*

[8] Harper v. Albany Mut. (F.) Ins. Co. 17 N. Y. 194; Harper v. N. Y. City (F.) Ins. Co. 22 N. Y. 441; Benedict v. Ocean (F.) Ins. Co. 31 N. Y. 389; Phœnix (F.) Ins. Co. v. Taylor, 5 Min. 492; Hayward v. Northwestern (F.) Ins. Co. 19 Abb. 116; Forbes v. Am. Mut. L. Ins. Co. 15 Gray, 249; De Camp v. N. J. L. Ins. Co. 3 Ins. Law Jour. 89, U. S. C. C. S. D. of N. Y.; Reynolds v. Comm. F. Ins. Co. 47 N. Y. 597.

reason to suppose it was understood by the promisee.[1] If it be uncertain, in view of the general terms of an instrument and the apparent object of the parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee.[2] Conditions and provisos in policies of insurance are to be construed strictly against the underwriters, as they tend to narrow the range and limit the force of the principal obligation.[3] Conditions providing for disabilities and forfeitures are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced.[4] If the language of a policy is capable of two interpretations, that one must be adopted which is most favorable to the assured, because the language used is that of the insurer.[5] The inquiry always is, is there between the exception and the scope of the undertaking in the policy any repugnance? If not, in construing the policy, the intent of the parties is to be gathered from both the written and printed portions and effect given to both, according to the ordinary rules of construing written contracts.[6] But some degree of acuteness should be called in to uphold and enforce such agreements whenever there has been a fair contract and a substantial compliance. Insurance companies are not favorites of the law.[7] The words of the application are to be

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[1] Hoffman v. Ætna F. Ins. Co. 32 N. Y. 405; Potter v. Ont. & Liv. (F.) Ins. Co. 5 Hill, 149; Barlow v. Scott, 24 N. Y. 40.

[2] Doe v. Dixon, 9 East, 15; Marvin v. Stone, 2 Cowen, 781, 806.

[3] Yeaton v. Fry, 5 Cranch, 335; Palmer v. Warren (M.) Ins. Co. 1 Story, 360, 365; Pelly v. Royal Exch. Co. 1 Burr. 349; Morse v. Buffalo F. & M. Ins. Co. 2 Ins. Law Jour. 622.

[4] Livingston v. Stickles, 7 Hill, 253; Catlin v. Springfield (F.) Ins. Co. 1 Sumn. 434; *ante*, §§ 55, 56, 57, 181.

[5] Western (F.) Ins. Co. v. Cropper, 32 Penn. 351; Merrick v. Germania F. Ins. Co. 54 Penn. 277; Franklin F. Ins. Co. v. Brock, 57 Penn. 74; Anderson v. Fitzgerald, 4 H. of Ld.'s Cas. 484, 507; s. c. 17 Jur. 995; 24 Eng. L. & Eq. 1; Fowkes v. Manch. & Lond. L. Ass. & Loan Ass. 3 B. & S. 917, 925; Fitton v. Acc. Death Ins. Co. 17 C. B. N. S. 122; s. c. 34 L. J. C. P. 28; Gershauser v. N. Brit. & M. (F.) Ins. Co. 7 Nev. 174; Reynolds v. Comm. F. Ins. Co. 47 N. Y. 597; Eclipse (F.) Ins. Co. v. Schoener, 2 Cincin. 474.

[6] Hayward v. Liv. & Lond. F. & L. Ins. Co. 5 Abb. N. S. 142.

[7] Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; Savage v. Howard (F.) Ins. Co. 2 Ins. Law Jour. 769, N. Y. Ct. of Appeals.

taken most strongly against the applicant,[1] though they are to be interpreted according to the fair and obvious import of the words used.[2] Where answers are warranties,[3] the questions should have a reasonable interpretation. The applicant has the right to answer questions on the basis that their terms are used in their ordinary signification, and if there is any ambiguity, so that the language of the questions is capable of being construed in an ordinary as well as in a technical sense, the company can take no advantage from such ambiguity.

The fact that the policy is a contract between a mutual company and one of its members does not modify the construction to be given to its terms. The relations of the parties are always to be considered in seeking the true interpre tation of their language. But their words used for a definite purpose and applied to a transaction of well understood character, must be held to convey the meaning and force which is ordinarily applied to them.[4]

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[1] Sceales v. Scanlan, 6 Irish Law, 367.

[2] Higbie v. Guardian Mut. L. Ins. Co. 53 N. Y. 603; s. c. 2 Ins. Law Jour. 761, N. J. Ct. of Appeals; Wilkinson v. Conn. Mut. L. Ins. Co. 5 West. Jur. 413.

[3] Price v. Phœnix Mut. L. Ins. Co. 17 Minn. 497; s. c. 2 Ins. Law Jour. 228.

[4] Cluff v. Mut. Ben. L. Ins. Co. 99 Mass. 317.

CHAPTER XIII.

THE EFFECT OF WAR UPON CONTRACTS OF LIFE INSURANCE.

§ 386. The question of the effect of the late rebellion upon policies on the lives of persons residing in the rebellious states, has been, and is likely to be, the subject of considerable litigation. The rebellion and the President's proclamation of non-intercourse prevented any direct legal communication between the assured and the companies, and therefore prevented the direct payment of the premiums, ordinarily necessary to keep the policies in force. In some cases the agents of the companies in the rebellious states continued to act and received payment of the premiums, usually in Confederate currency; while, in others, the agents either refused to act or their powers were expressly revoked.

There were, at the close of the rebellion, no decided cases directly in point. The questions arising have, however, since been passed upon in various forms by the courts of last resort in New York, Virginia, Kentucky, Mississippi, Georgia and Missouri, as well as by inferior courts in New Jersey and Maryland, and by the Circuit Courts of the United States in the Southern District of New York, the Southern District of Mississippi, the Western District of Tennessee, and the Eastern District of Virginia. With the exception of the court in Georgia and that in the Western District of Tennessee, there is in all a substantial agreement in the results arrived at, though the processes of reasoning by which it is attained are not in all respects identical. This decided preponderance of decision, however, can hardly be considered as conclusive, for the reason that the Supreme Court of the United States stands equally divided upon the question. The two cases decided in the Southern District of New York and the West-

ern District of Tennessee, respectively, came before that court on appeal in the spring of 1874, being argued together, and both were affirmed by a divided court, though the two decisions were diametrically opposed in their conclusions.[1]

As the matter now stands, the decided weight of authority is in favor of the following propositions:

1. The contract of life insurance is not an executory contract of such a nature that it is *ipso facto* terminated or abrogated by the outbreak of hostilities which make the insurer and the insured public enemies.[2]

2. The condition rendering the policy void in the event of the non-payment of the premiums on fixed days had no reference to a state of war, and so long as such war continues the payment of the premiums is excused; and if, upon the resumption of legal intercourse, the overdue premiums and interest are promptly paid or tendered, no forfeiture arises. If the insured has died during the war, the assured may, on complying with the terms of the policy as to notice and proof within a reasonable time after the close of the war, demand and compel payment of the amount insured, after deducting the premiums which were unpaid at the time of death and the interest thereon.[3] If the insured survives the war and, within a reasonable time after its close, tenders the unpaid

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[1] Only eight judges were present in the Supreme Court at the time of the decision referred to, Chief Justice Waite not having then taken his seat. It is probable that an authoritative decision of the Supreme Court will be obtained within a few months.

[2] Sands v. N. Y. L. Ins. Co. 50 N. Y. 626; s. c. 2 Ins. Law Jour. 372; Cohen v. Mut. L. Ins. Co. 50 N. Y. 610; s. c. 2 Ins. Law Jour. 426; N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179; Manhattan L. Ins. Co. v. Warwick, 20 Gratt. 614; Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234; Statham v. N. Y. L. Ins. Co. 45 Miss. 581; Smith v. Charter Oak L. Ins. Co. Central Law Jour. Feb. 12, 1874, Supreme Court of Mo.; Seyms v. N. Y. L. Ins. Co. MSS. U. S. C. C. South. Dist. of Miss.; Hancock v. N. Y. L. Ins. Co. 2 Ins. Law Jour. 903; s. c. 13 Am. Law Reg. 103, U. S. C. C. East. Dist. of Va.; N. Y. L. Ins. Co. v. White, 2 Ins. Law Jour. 917; s. c. 2 South. Law Rev. 549, Supreme Court, Va.; *contra*, Tait v. N. Y. Life Ins. Co. MSS. U. S. C. C. West. Dist. of Tenn.; Dillard v. Manhattan L. Ins. Co. 44 Geo. 119.

[3] Sands v. N. Y. L. Ins. Co. 50 N. Y. 626; Cohen v. Mut. L. Ins. Co. 50 N. Y. 610; Hillyard v. Mut. Ben. L. Ins. Co. 35 N. J. 415; N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179; Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234; Manhattan L. Ins. Co. v. Warwick, 20 Gratt. 614; Seyms v. N. Y. L. Ins. Co. U. S. C. C. South. Dist. of Miss.; Hancock v. N. Y. L. Ins. Co. 2 Ins. Law Jour. 903; s. c. 13 Am. Law Reg. 103, U. S. C. C. East. Dist. of Va.; *contra*, Tait v. N. Y. L. Ins. Co. MSS. West. Dist. of Tenn.; Dillard v. Manhattan L. Ins. Co. 44 Geo. 119.

premiums, he may, in case the company refuses to receive them, or to recognize the policy as in force, maintain a bill in equity to declare the rights of the parties.[1] Or, under like circumstances, payment of the premiums having been tendered to, and refused by, the company's agent, during the war, the beneficiary may treat such refusal as a breach of the contract, and may maintain an action at law for damages; and the measure of damages is the value of the policy at the time of such breach of contract.[2]

3. The contract of life insurance is not a contract from year to year, so as to make the prompt payment of the premiums annually a condition precedent, but is a contract for life, to which the payment of the premiums is a condition subsequent.[3]

4. The powers of the agents of the insurers in the rebellious states, so far as they related to the payment of premiums on policies issued through them respectively, were not revoked by the war, and payment or tender to them was equivalent to payment to the company, where but for the war such would have been the case. After one tender and refusal, it was not necessary to make a tender of the next accruing premium.[4]

5. Although an agent under such circumstances would not have the power lawfully to enter into new contracts of insurance,[5] nor to transmit money received for premiums across the hostile lines to his principal, yet he might lawfully receive premiums on policies in force before the war,

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[1] Cohen v. Mut. L. Ins. Co. 50 N. Y. 610.

[2] Smith v. Charter Oak L. Ins. Co. Central Law Jour. Feb. 12, 1874, Supreme Court of Mo.; Hancock v. N. Y. L. Ins. Co. 2 Ins. Law Jour. 903; s. c. 13 Am. Law Reg. 103, U. S. C. C. East. Dist. of Va.

[3] Sands v. N. Y. L. Ins. Co. 50 N. Y. 626; Cohen v. Mut. L. Ins. Co. 50 N. Y. 610; Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234; N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179; Manhattan L. Ins. Co. v. Warwick, 20 Grat. 614.

[4] Sands v. N. Y. L. Ins. Co. 50 N. Y. 626; N. Y. L. Ins. Co. v. Clopton, 7 Bush. 179; Manhattan Life Ins. Co. v. Warwick, 20 Grat. 614; Hamilton v. Mut. Life Ins. Co. 9 Blatch. 234; Statham v. N. Y. Life Ins. Co. 45 Miss. 581; Smith v. Charter Oak L. Ins. Co. Central Law Jour. Feb. 12, 1874; *contra*, Tait v. N. Y. L. Ins. Co. MSS. U. S. C. C. West. Dist. of Tenn.

[5] N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179.

and such the insured might lawfully pay.[1] At least, a tender to such an agent, and his refusal to receive the premium because of his inability to transmit the same to his principal by reason of the intervention of a state of war, would save a forfeiture of the policy.[2]

5. Such payment could be lawfully made in confederate money.[3]

6. Though the assured in a mutual company are in some sense partners, the relation between them is not such a partnership as is dissolved by war.[4]

7. It must be considered as an implied provision in the contract, that if the assured joins in active hostilities, it becomes void.[5]

8. Some of the cases hold that under the laws of the states, where the insurance was obtained, the company was bound to keep an agent there, to whom payment might have been made even during war, and that its failure to do so excused the non-payment of annual premiums.[6]

§ 387. These results were not reached in the courts where such views are held, without strenuous and able opposition on the part of the insurers. It was urged on their behalf, (1) that the outbreak of the war terminated existing contracts of insurance upon the lives of those who remained residents of the rebellious states; that all the citizens of these states, became, on principles of public policy, public enemies, whatever may have been their individual sentiments or acts, and that all intercourse with them was illegal; that any insurance of the life or property

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[1] Manhattan L. Ins. Co. v. Warwick, 20 Grat. 614.

[2] Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234.

[3] Sands v. N. Y. L. Ins. Co. 50 N. Y. 626; N. Y. L. Ins. Co. v. Clopton, 7 Bush, 179; Robinson v. Internat. L. Ass. Soc. 42 N. Y. 54. In Manhattan L. Ins. Co. v. Warwick, 20 Gratt. 614, it is held that the company could refuse payment in confederate funds.

[4] Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234; Cohen v. Mut. L. Ins. Co. 50 N. Y. 610; Hillyard v. Mut. Ben. L. Ins. Co. 35 N. J. 415.

[5] Sands v. N. Y. L. Ins. Co. 50 N. Y. 626; Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234.

[6] Manhattan L. Ins. Co. v. Wa wick 20 Grat. 614; Hamilton v. Mut. L. Ins. Co. 9 Blatch. 234.

of an enemy was against public policy and void; that this was true not only of contracts made during the war, but of those made prior to it; that such was clearly the established law as to insurance upon enemies' property, and that the same principles and reasons applied to insurance upon the lives of enemies with equal if not greater force, as men were of as much importance in war as property; that though there was no decided case to this effect upon life insurance, the doctrine was substantially implied in several cases, and had failed to be directly so held only because of the recent development of life insurance, and the failure of a case directly in point to arise previously; that the contract of life insurance is clearly an executory contract, and that all such contracts are on well established principles terminated by war; that if such contracts were held valid, the anomaly would be presented of a subject of one nation insuring against death the subject of another nation at war with his own, and who might be actually in arms against the nation of the insurer, while it was at the same time the duty of the insurer as a good citizen to seek the destruction of the person whose life he had insured; that the assured could not mean what they frequently asserted, that the contract was suspended during the war, for in such case if the insured died after the outbreak of the war, but before a default in premium, they would surely claim the insurance money; that in fact what they meant was that one clause of the contract was suspended, which was an utter absurdity, leading to the result that while the enemy is excused from the performance of the particular stipulations, the loyal citizen is bound by the contract, though in a mutual company the result would be that the loyal citizen must pay for the enemy's default. It was further urged, (2) that if the contract of insurance was not *ipso facto* terminated on the outbreak of the war, it was a contract from year to year, renewable at the option of the assured on his payment on fixed days of the premiums, and was therefore in those cases where a day of payment had arrived after the outbreak of the war,

in effect a contract made with an enemy during the actual existence of hostilities, which it was universally admitted could not be legal; that as it was unlawful for the insurer to hold any intercourse with the insured, the former could not receive from the latter the payment of the premiums, and yet such payment was a condition precedent to the continued vitality of the contract, which furnished an additional reason why it should be construed as made subject to the proviso, that it was to terminate in case of a war in which the parties should become public enemies; that the insured had expressly agreed under penalty of forfeiture to make the stipulated payments on fixed days, and that he must be held to such agreement, and the contracts be held to be forfeited by non-payment of the premiums; for a person who has so contracted is not excused by accidents or inevitable necessity, inasmuch as he might have protected himself against them by his contract, and moreover it was his choice to remain in the rebellious states; that (3) as to payment or tender to persons in the rebellious states, who prior to the war had been agents of the insurers, their powers as such agents were revoked by the war, certainly so far as they sought to do acts necessary to the keeping in force an unlawful contract; that it was absurd to hold that the insured retained alien enemies as his agents; that under the laws of the Confederate States moneys paid to such former agents became at once subject to confiscation by the Confederate Government, and thus contributed directly to the maintenance of the rebellion, and that this was no mere theoretical liability, but was actually the result in one reported case.[1] It was moreover urged that it would be exceedingly inequitable to hold that the assured had the right to pay overdue premiums after the close of the war, for the effect would be, that as the payment or non-payment was at the option of the assured, he would thus have the opportunity to wait for years, and if the insured should continue in good health, he might treat the

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[1] Manhattan L. Ins. Co. v. Warwick, 20 Gratt. 614

policy as having terminated at the outbreak of the war, while if the assured died or became an invalid, he could at the close of the war elect to tender the premiums, and so keep the policy in force.

§ 388. The various questions were passed upon in New York, in Sands v. New York Life Insurance Co.,[1] and in Cohen v. Mutual Life Insurance Co.[2] In the former it appeared that the life of plaintiff's assignor was insured in 1850, and that he died at Mobile in July, 1862; that the premiums were all duly paid to an agent of the defendants at Mobile, down to January, 1861, and were by him remitted to the defendants; that the premium which became due in January, 1862, was paid to the same person in confederate notes; that the agent had originally, and by custom, authority to receive premiums; that his authority was not expressly revoked by the company, and that on August 21, 1861, after the outbreak of the rebellion, the company requested him to remit to an agent in New Orleans money to pay a loss there; though in May, 1862, they gave a notice of the closing of all agencies, and wrote to him that they were not at liberty to make any arrangement in reference to the renewals of their policies, but would act liberally, but for the present must treat all Southern policies as cancelled; the President of the United States, on Aug. 16, 1861, issued a proclamation forbidding commercial intercourse with the rebellious states. In this state of facts a referee, now Judge Robertson, of the Court of Common Pleas of the city of New York, in a very able opinion, found that after the issue of the proclamation, the insured and the defendants became public enemies, and remained so till his death; that from the time of such proclamation the further execution of the contract of insurance was unlawful, and that the authority of the agent at Mobile to act for the defendants was revoked by the occurrence and existence of a state of war, and that therefore a payment to him was not a payment to the company. On appeal this

[1] 50 N. Y. 626; s. c. 2 Ins. Law Jour. 372.

[2] 50 N. Y. 610.

decision was reversed by the General Term of the Supreme Court, and the latter decision was affirmed by the Court of Appeals. The latter court say: "This contract of the parties I do not think was nullified by the war. What was it? * * It was a valid policy for the life of the insured, to become void by the omission to pay the agreed annuity. In principle I do not see why it is not like a lease or grant of lands in fee, reserving rent, to become void if the rent is not paid, if the condition subsequent be not complied with. * * The agreement is to insure for the life of the assured. Subsequent failure to pay the annuity when due defeats the policy. It is a condition subsequent, not precedent. * * Is this contract criminal or illegal as contravening the policy of the government? If it be, if it give aid and comfort to the enemy, it is nullified by the war. It is insisted that it is void because it intends and implies commercial intercourse between citizens of hostile states—'locomotive' intercourse as it is termed—and if it do it is annulled by the war.[1] Clearly it is not law, nor do these or any recognized authorities intend to hold that a valid debt by note, bond or contract, existing when the war began, against a citizen of a Confederate State, in favor of a citizen of a Northern State, was nullified by the war. The debt is suspended until peace returns. It is not destroyed. Nor would it make the least difference as to the validity of the claim by contract that it was for the purchase of a farm of a citizen in a Confederate State, upon which contract large payments had been made, and one or two yet remained unpaid, even though it were expressly stipulated that if the after payments were not made when due, the contract should be void and the purchaser should forfeit as liquidated damages all payments heretofore made thereon. The war would suspend such a

[1] Woods v. Wilder, 43 N. Y. 164; Griswold v. Waddington, 16 Johns. 438; Clarke v. Morey, 10 Johns. 69; United States v. Grossmeyer, 9 Wall. 72; Buchanan v. Curry, 19 Johns. 137; Bell v. Chapman, 10 Johns. 183; *ex parte* Boussmaker, 13 Vesey, 71; Semmes v. Hart. Ins. Co. 13 Wall. 158; The Protector, 9 Wall. 687; United States v. Wiley, 11 Wall. 508.

contract until peace. There is no principle upon which war could annul it. This is so, irrespective of the question of real or personal estate involved. Such a contract affords no aid or comfort to the enemy. It requires no 'locomotive' intercourse, unless such intercourse be required by a bond or note past due. The principle involved in such a contract would be the same if it contained no provision as to its becoming void, but only provided for the execution of a deed upon the payment being made as therein provided. Yet such a contract would be nullified by the war according to some text-books, and by the dicta of some judges. The payments not being all made when the war commenced, there was no vested right to a deed. Some acts, therefore, remained to be done 'by or between the parties during the war.' Hence they say it was abrogated by the war. * * It is really of no moment whatever whether these payments were optional with, or obligatory upon the assured, as to this question. The payments were all to be made by virtue of and under a contract made before the war. Such a contract could not be nullified by the war, unless it was hostile to the policy of the government—at war with its interests. * * The general rule undoubtedly is that it is only commercial contracts, such as give aid and comfort to the enemy, or are forbidden by or against the policy of the government, that are void as to all acts to be done during the war, though the contracts were made before the war. Contracts for the insurance of the enemy's property, of affreightment and of commercial co-partnership, are avoided thereafter by the breaking out of the war; because they are inconsistent with the war—inconsistent with the interests and policy of a government whose purpose is by the war to destroy or cripple the enemy's property and commerce.[1] * * The rule that makes such contracts as before alluded to void, has no application to life insurance. This contemplates no commercial intercourse, no aid to the enemy's commerce, no aid or comfort to

[1] Furtado v. Rodgers, 3 Bos. & Pul. 191; Kellner v. Le Mesurier, 4 East, 395, and the two cases following; Kershaw v. Kelsey, 100 Mass. 561.

the enemy in violation of governmental policy. It is idle to say that it fosters or implies commercial intercourse. That money falls due annually to the defendant for the premiums during the war, does not make the contract void, any more than would installments of debt, falling due upon a bond or note given before the war, render the note void. That is not commerce or commercial intercourse. The law does not presume that an honest debt due to an alien enemy will be paid over to him during the war, even though paid to his resident agent.[1] Nor is it made void by the fact that the policy itself might have become payable during the war. It would be no more void for that reason than if a note or bond, given before the war, should so fall due. The right to receive or collect it by the representatives of the assured is suspended until peace is restored. Why is not the note or the bond given before the war made void by the war? Simply because the interests of government do not require it. Their validity is not hostile to the government. Because it is the settled policy of government to impair as little as possible the private rights of citizens by national differences.[2] That this contract of insurance cannot possibly operate in hostility to the government or its policy in the war, I think is entirely plain.

"If it insured the enemy against death in the enemy's army, it would of course be void, because then, although it gave to the assured no benefit to himself, yet it gave it to his family by his death. But it insured against no such loss. An exception against such a loss would be implied in the contract as being illegal, but it is plainly expressed here. The policy provides: 'If he should enter into any military or naval service whatever, or if he should die in the known violation of any law of the United States, the said policy shall be null and void.' It is insisted that men as well as money are necessary to the war. True, but this insurance is

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[1] Buchanan v. Curry, 19 Johns. 137; Denniston v. Imbrie, 3 Wash. C. C. 396; Ward v. Smith, 7 Wall. 447.

[2] Clarke v. Morey, 10 Johns. 69; Bradwell v. Weeks, 13 Johns. 1; Scholefield v. Eichelberger, 7 Peters, 586.

a direct reward to keep men out of war. If they go in, the policy is instantly void. It may be regarded, therefore, so far as it operates at all, as a direct premium to prevent the filling up of the enemy's army. Again, it is not the purpose or policy of government to destroy mere non-combatants in the enemy's country—civilians, not belonging to the army. It is the rule of all civilized warfare to protect such persons—to shield them from injury. Then why should this insurance be condemned as to its ultimate object? Again, it would not be claimed that an annuity purchased from an enemy before the war, and paid for, was made void by the war, though payable any number of times during the year. Yet the difference in principle is not apparent between that and the case at bar. The only difference in form is that there the annuitant paid in full for the annuity, and receives back his annuity in installments. Here he pays by annual installments, and receives it back in gross by his representatives. If it be unlawful to pay the annuity during the war by international intercourse, then it must not be paid in that way. But there is no pretence of avoiding such an annuity by the war, because it might by possibility, like any other, be improperly paid. * * Well-considered cases hold that payment of these annual installments is not like the cases made void by war of affreightment and commercial copartnership, it being a single act, or an annual act, instead of a continual business. * * This is reasonable. But the stronger ground, in my opinion, is that the contract having been made before the war, and it being of the character before described, its fulfillment afterward is not against the purpose or policy of the war. Cases of marine insurance, of insurance against capture by the enemy on the sea, and contracts of affreightment, have no analogy to this. This contract, therefore, was neither illegal nor criminal.

"It is urged that the last premium was not paid, and hence the policy became void. If it was not paid I do not think the consequences claimed would follow. The war suspended this contract, and no forfeiture for non-payment would

arise while the war lasted, provided the premiums with proper interest were promptly paid on the return of peace. It is clear that this state of things was a surprise to both parties. They made no provision for a war. If they had, it is equally clear that they would never have provided for such an inequitable result as the defendant now claims. It is urged that these payments at the time required are a condition precedent to the right to the insurance, which nothing can excuse, not even an act of Providence can dispense with. Without stopping to question this position, it is clear that war, in this respect, then, can accomplish what cannot be done otherwise. War extends the statute of limitations,[1] not only against citizens, but against the United States.[2] It is equally a condition precedent to a right to recover on a policy that the action shall be brought within the time specified in the policy. The parties have an undoubted right to contract to fix a short statute of limitations obligatory in the given case. Yet war annuls that limitation, if necessary, and the action may be brought wholly irrespective of that provision of the policy. So held in Semmes v. Hartford Ins. Co.,[3] where that was the sole point of the case. If such be its effects upon that provision, there is no reason why it shall not save from forfeiture from this condition precedent of payment of the premium when due. It is the fault of neither party that it is not paid, and war suspends contracts like these, but does not destroy them. Nor is there any injustice to the defendant. Of course there is none in the present case, where the assured had confessedly paid for twelve years and died in six months thereafter. In fact, had paid the last premium. But justice is generally done by requiring the payments promptly after the war ceases, with proper interest. The companies do no more than invest their money upon interest. If some fail thus to pay, of course they lose all they have paid, which cannot injure the company. Symptoms of war are usually quite plainly visible before it comes, and in-

[1] The Protector, 9 Wall. 687; Hanger v. Abbott, 6 Wall. 532.
[2] U. S. v. Wiley, 11 Wall. 508.
[3] 13 Wall. 158.

surers may observe and cease to insure, so that generally a reasonable advance in premiums is made by the assured before the war comes. Cases may possibly occur where the company might lose by the failure to pay by the assured when peace is restored. In ordinary business they would be rare. But the great injustice would be generally to the assured by this forfeiture. It is sought to compare it to commercial copartnership, to which it has no analogy. But even such a partnership is avoided only as to the future. Past transactions and liabilities are valid. But here, if this contract be made void, all past transactions are made void. The assured would lose all his payments upon the grounds claimed by the defense. But no such question arises here, as the premium was paid. The defendant had a general agent in Mobile when the payment was made, as it lawfully might, to receive the demands due the company. That it had an agent, in fact, in January, 1862, when the premium was paid, is proved and found by the referee. His continuance, after the President's proclamation, was expressly recognized by the defendant by letter of the 21st August, 1861. That he was lawfully defendant's agent is settled.[1] It is urged as a ground of injustice to defendant, that if the money was paid to defendant's agent at Mobile, it might and would be confiscated to the enemy's government. True, so might any debt due from an alien enemy, but that reason would not invalidate the debt. That the payment in confederate notes was a valid payment is decided."[2]

In a similar case decided at the same time, in which, however, the insured brought the action, the same court—a different judge writing the opinion—say:[3] "The contract was not as to all its stipulations, and as to both parties, execu-

[1] Buchanan v. Curry, 19 Johns. 137, where the point was involved; Denniston v. Imbrie, 3 Wash. C. C.; Ward v. Smith, 7 Wall. 447; Conn. v. Penn. 1 Pet. C. C. 524; U. S. v. Grossmeyer, 9 Wall. 72; Robinson v. Inter. L. Ass. Society, 42 N. Y. 54; Kershaw v. Kelsey, 100 Mass. 561.

[2] Robinson v. Internat. L. Ins. Co. *supra;* Polglass v. Oliver, 2 Cromp. & Jer. 15.

[3] Cohen v. N. Y. Mut. L. Ins. Co. 50 N. Y. 610; s. c. 2 Ins. Law Jour. 426.

tory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of the defendant, its undertaking being to pay the amount specified upon the death of the insured. It is no answer to say that the plaintiff had only paid for the risk incurred from year to year. The annual premium paid during the first years of a life policy is in excess of the actual risk, and this excess is so much paid in advance for the greater risk during the later years in case of a prolonged life. The insurers would be greatly the gainers by avoiding all life policies on young lives after the payment of the annual premiums for ten or fifteen years, terminating the risk before the greater hazard of loss—the result of advanced age—has been incurred. The contract was a continuing contract in the sense that it was to be performed in the future, but it was not a contract of continuance, in its performance. The act to be performed by the defendant was a single act, the payment of a specified sum upon the happening of a certain event, and in this respect was like a covenant or promise to pay a sum of money at a day certain, or upon any condition lawful in itself. There is no pretense that a contract of the latter kind would be dissolved by war. The contract would remain, the remedy would be suspended. The act to be performed by the plaintiff was a single act to be performed at stated periods, and was not like the contract of partnership, and some other contracts which are continuous in their performance. * * There is nothing in the policy of the law or the interest of the public calling for an enforcement of the law of confiscation incident to a state of war after the war has ceased and the people of the two belligerent nations have again become one, solely for the benefit of one of two contracting parties, by the forfeiture of the rights of the other. This would be simply a confiscation of property after war had ceased, at the instance and for the benefit of individuals. By the payment of the annual premium in April, 1861, the life was insured until April, 1862; the engagement of the defendant was then lawful, and was

to the effect that the company would pay the plaintiff five thousand dollars upon the death of her husband within the year. A promissory note in that form, made upon a good consideration, would be obligatory, and if the death occurs within the year, although after war had intervened, the right of action would be suspended during the war, but revive with the return of peace. * * The policy in this instance protects the insurers and makes void the policy if the insured enter any military or naval service, or dies in the known violation of the laws of the United States, so that the risk was not increased by the state of war, nor the ability of the enemy to fill up the ranks of its army and navy affected by the insurance upon the life of its citizens. Those insured would rather be deterred from taking up arms against the United States, lest their policies should be avoided. Had the insured died at any time before April, 1862, I think there can be no doubt that the contract would have been regarded as one of those which, lawful when made and executed by the one party, are not dissolved, but merely suspended by the existence of war, and that a recovery could have been had at the close of the war. The question then remains, whether the non-payment of the annual premiums during the years 1862, 1863, and 1864, involved a forfeiture of the policy and of all payments before then made. * *

"Unless the performance was waived by the defendant, or is legally excused by the existence of the war, the plaintiff must fail in her action and submit to the loss resulting from the forfeiture. It must be borne in mind that the war was the act of the states, and that individual citizens are not identified with their government so as to expose them to the rule of law, that he who by his own conduct prevents the fulfilment of a contract, or renders its performance impossible, shall not take advantage of a non-performance on the other side, or excuse the non-performance on his part.[1] The condi-

[1] Odlin v. Ins. Co. of Penn. 2 Wash. C. C. 312; Francis v. Ocean Ins. Co. 6 Cow. 404; s. c. in error, 2 Wend. 64.

tion of affairs which made the payment of the premiums by the plaintiff during the years named unlawful, and therefore impossible, was not created by the act or default of the plaintiff, but resulted from the acts of the governments of which the respective parties were subjects. There is a manifest distinction between mere impediments and difficulties in the way of the performance of a condition, and an impossibility created by law or the act of the government. This is clearly recognized in Wood v. Edwards;[1] People v. Bartlett.[2] An individual by his covenant may undertake, as against his own acts and the acts of strangers, but not against the acts of God or his government, or of the obligee.[3] * * So, too, a party is excused from the performance of his covenant when the performance is made unlawful by act of Parliament. If made absolutely unlawful it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation.[4] * * She was guilty of no laches, and why subject her to a forfeiture? No injustice is done the defendant in this case by permitting the plaintiff to make now the payments which she could not lawfully make between 1861 and 1865. The interest will compensate for the non-payment at the time, and the defendant in legal contemplation will be precisely in the situation it would have been had the money been paid on the law day. * *

"It was also claimed that the defendant, being a mutual company, of which all holders of policies were members, it was a partnership which was dissolved by the war. Trading and commercial partnerships, and perhaps all partnerships, are dissolved by war between the states of the several partners. But whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting, and of

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[1] 19 Johns 205.

[2] 3 Hill, 570.

[3] Per Nelson, J., People v. Bartlett, *supra*.

[4] Brewster v. Kitchin, 1 Ld. Raym. 317.

suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer, and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected, as in other cases. Other and incidental rights are secured to the plaintiff, as a member of the company, and one of the corporators, but this does not make the members partners as between themselves, or affect the express contract of the corporation. If it was a partnership, as claimed, and dissolved by the war, the plaintiff has not forfeited her share in the assets of the copartnership, but is entitled to an accounting as of the day of the dissolution, and to her due proportion of the property and assets. This would lead to a result not desired by the defendant."

§ 389. The case of Hillyard v. Mutual Benefit Life Insurance Co. is to the same effect. In deciding the case, however, the court met one of the arguments urged by the company as follows:[1] "There can be no question but that it is, in some degree, a hardship on these defendants to have their responsibility kept alive during the time the benefits of the contract were not fully enjoyed by them; but it is to be remembered that whenever the law interferes and ties up a party from performance, some hardship is the inevitable result. Postponements of performance on the one side will generally be injurious to the other. Such results cannot be avoided. They are not uncommon. It has been repeatedly decided that when the payment of a debt is suspended during a war, the interest of the debt is lost to the creditor. Such losses are within the scope of the contracts with which they are connected, construing them by their express terms and their legal implications."

In New York Life Insurance Co. v. Clopton,[2] the court say the appellant's counsel urge "that the contract was one of continuing performance, and therefore was dissolved, and not merely suspended. We do not see the law in that light.

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[1] 35 N. J. 415.

[2] 7 Bush, 179.

Where a single act such as the payment of a debt, would perform a contract made before the war, belligerent policy interdicted it, because it might aid the enemy in the prosecution of hostilities; consequently suspension of performance until the restoration of peace would effectuate the whole aim of the law, without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle and end of the temporary interdict. In that class of cases it is the contract, and not the performance, that is continuing; and a suspension of remedy, and not a dissolution of the contract, is all that is necessary, befitting or just. But in such cases as partnership or affreightment the performance is continuing and unremitting until the end of the contract shall have been consummated; and, therefore, as supervening war between the parties disables them from performing any of the incumbent duties, and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war. And this illustrates 'continuing performance,' and the contradistinctive reason for dissolving the contract instead of suspending the remedy in that class of cases. The duties of partners to each other while the relation subsists are amicable and incessant. A war which puts them in a state of hostile antagonism disrupts their business relations and incapacitates them to perform their duties to each other; such a change is itself, in fact and in law, a dissolution. In like manner the performance of a contract of affreightment being amicable and incessant from the commencement to the completion of the transportation, a war which makes it contraband, and thereby frustrates its object, necessarily destroys the legal obligation of the contract, and the law cannot substitute another to be performed after the close of the war. But the reasons for dissolution in these two classes of cases seem to be inapplicable to contracts which may be performed by a single act, or by periodical acts between which there is nothing to perform, and consequently no continuity of performance. Between a single act and such periodical acts there is no apparent difference in reason or principle; therefore the law, which

only suspends the remedy in the one case, cannot consistently dissolve the contract in the other. According to this definition, the ordinary contract of insurance does not seem to belong to the class of 'contracts of continuing performance.' * * In this case the insurance was an executed entirety for the 'prescribed term,' and the only performance which could devolve on the underwriter was to pay the stipulated amount of $5,000, in the event of loss insured against, fulfilment of which was not a continuing act, but a single act of a continuing contract; and the consideration, though payable in annual instalments, was yet an entirety also; and, as already suggested, full performance was not as defined, of that kind technically styled continuing. * * But the principle of this concession would not avoid a policy insuring property which is exempted by law from belligerent power; and while it would avoid a policy insuring the life of one who becomes an actual enemy of the government of the insurer, which had the right to destroy that life, it would not effect the validity of an insurance of the life of a neutral or passive non-combatant, over whose life there is no belligerent power; for though the domicil makes him a technical enemy, whose property may be lawfully captured as enemy's property, yet as such nominal hostility does not subject his life, like his estate, to peril, no belligerent right is affected by the continued validity of the insurance, and consequently, in such a case, neither authority nor principle would avoid the policy any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation. * * The refusal to accept the tender for the year 1862 dispensed with a formal repetition for the years 1863 and 1864."

§ 390. In Manhattan Life Insurance Co. v. Warwick,[1] the defendant had insured the life of another as security for a debt due to him, obtaining the policy through an agent of plaintiffs at Richmond. There was the usual condition as to

[1] 20 Gratt. 614.

forfeiture for non-payment of premiums. It was also provided that it was not to be binding till countersigned by the agent at Richmond, while on the back was indorsed "no payment of premiums binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company." Three premiums, subsequent to the first, were paid to the agent at Richmond, printed receipts being given signed by the officers of the company, but providing that they were not valid unless countersigned by that agent. A fourth, but written, receipt was given, dated in July, 1861, signed only by the agent at Richmond, with an indorsement by him that the assured had paid the exchange on New York, thereby making the payment equal to New York currency. When the agent received this last premium, he stated to the assured that he had no printed blanks, but would send on the money and get the receipt, and in the mean time would give him this written receipt. On the same day the agent wrote to the company for the printed receipt, and wrote again a few days afterwards, saying that he would send on the premium as soon as the receipt was sent him. The company received the letter, but did not send the receipt; they never received the premium, though the agent purchased a draft on New York, which, however, was never presented, and the money was paid by the brokers who drew the draft to a receiver appointed by the Confederate States. When the premium for 1862 became due, the assured called on the agent and offered to pay it; but the agent declined to receive it, saying that he had received instructions not to receive the money, nor to renew the policy, nor to continue it. The agent at Richmond had, in May, written to the company to know what course to pursue, and the company had, the same month, replied that "we must rely on their paying their premiums here, or make it optional with the insured either to pay the premiums, or have their policies cancelled, with permission to renew them at present rates at any time within a year, upon satisfactory evidence of good health; and, in case of such risks being assumed by the assured, the

company will allow and pay the value of such policy at the time of cancellation in case of death during the time the policy has lapsed." Subsequently, and on receipt of the agent's letter asking for the renewal receipts, they wrote that they could not consent to the agent receiving the premiums on policies for which he had no renewal receipts, as "the premium must be paid here, or by draft on this city." The insured died in November, 1862. On this state of facts, the Court of Appeals of Virginia, by three judges against two, held the company bound to pay the sum insured, after deducting the unpaid premium for 1862, therefore charging the company with that received by the agent in 1861. In the prevailing opinion, Anderson, J., says: "When the assured was involved in no default, but was at the place when and where payment was to be made, ready and willing to pay, but was prevented by the disability of the company to receive payment, from whatever cause, he having had no agency in producing it, the company is not entitled to claim the forfeiture, or to be relieved from its obligation to pay the sum assured. * * Upon this contract the questions arise, first, was the city of Richmond, or the city of New York, the place of payment; and, secondly, was Macmurdo the agent, or an officer in New York the agent to whom payment was to be made?" After a careful examination of the facts and of the laws of Virginia as to foreign insurance companies, the court arrive at the conclusion that, "according to the intent and meaning of the contract, the premiums were to be paid by the assured to the agent of the company in Richmond, Va., and not to the officer or agent of the company in New York." As to the effect of the war, both in dissolving the contract between the parties, and in revoking, *ipso facto*, the power of the agent, the opinion continues that the contract was partly executory and partly executed; as far as the company was concerned, it was wholly executory, as they had done nothing, while the assured had paid large sums for premiums; by so doing, he had become vested with a right, not for a year, but for the life of the insured; no new contract was necessary every year, but only the annual payment

of the premiums. "The contract being made strictly within Virginia, with an agent residing there, and who was to continue to reside there as long as any stipulation of the contract was unperformed, an agent, with whom the contract was to be performed, and to whom the premiums were to be paid in Virginia, as has been shown, it seems to me that this case does not fall within the rule, as applied, or within the reason of it, as explained and illustrated by the judges in any of the numerous cases cited by the learned counsel. In all those cases the contract was to be performed in the enemy's country. Here, the performance is strictly restricted by the contract itself, according to its intent and legal effect, and by the designed policy of the law, by authority of which it was made, to the limits of Virginia. * * Upon this contract they could sue and be sued in the public courts of Virginia, even pending the war. * * In the performance of this contract by the assured, it was not necessary that there should be any 'interchange,' 'transfer,' or 'removal' of property from this State into the enemy's country. Nor did its performance require any 'communication,' 'locomotive intercourse,' 'negotiations and contracts,' between him and the plaintiffs in error, or an alien enemy. * * If the contract is partly executed, and rights under it have vested, and it cannot be dissolved without the loss or forfeiture of one of the parties, and cannot be carried into execution consistently with the duty of the parties to their countries respectively, while the war lasts, in such case it should not be dissolved, but only suspended. But if it can be carried into execution, notwithstanding the war, without conflicting with the obligations of allegiance of either party, it will be neither dissolved nor suspended."

§ 391. In the case of Hamilton against the Mutual Life Insurance Co., in the Circuit Court in the Southern District of New York,[1] it appeared that in March, 1858, a policy was issued to Goodman, the plaintiff's testator. He was, at the time, a citizen of, and a resident in, Alabama, and continued

[1] 9 Blatch. 234.

to be such until his death, in June, 1866. The premiums were regularly paid for 1861 to an agent of the company at Mobile, by whom they were transmitted to the company at New York. In March, 1861, the company withdrew all their agencies from Alabama, and had no agent in that state until 1869. After 1861, no further premiums were paid, but the assured was always ready to pay, but did not pay because of the revocation of the agencies, and because the rebellion prevented lawful intercourse between Mobile and New York. The restrictions against intercourse continued until May, 1865. Afterwards, and before March, 1866, he applied to the company, at New York, to receive the premiums in arrear, with interest. It refused to do so, or to recognize the policy as subsisting. The plaintiff, as his executor, renewed the application, but it was refused, on the ground that the policy was forfeited. He then filed a bill, praying for a decree, declaring the policy to be subsisting and not forfeited, and directing the payment of the amount insured by it, less the unpaid premiums, and interest thereon, and it was held that he was entitled to such decree. The court say: "There would seem to be no principle on which it could be held, that, in this case, the war dissolved and abrogated this policy, which would not require the court to hold equally that the policy would have been abrogated by the war, if Goodman had died after the 16th of August, 1861 [the date when intercourse became unlawful], and before the 2d of March, 1862. In such case, Goodman having been alive on the 16th of August, 1861, the court would be asked to hold that the rights of the parties were to be determined according to their *status* at the time the proclamation of that date was issued, and that, although Goodman had punctually paid all previously accruing premiums, and had died without making default, yet, the contract being one contracting for continuing performance by him in paying premiums annually, it was abrogated by the war on the 16th of August, 1861, so that the insurer was released from liability on it. A decision to that effect would shock every

sense of justice. * * It is not to be conceded, that, under the policy in this case, the acceptance of a renewal premium would have been a new insurance. * * The principle on which the rule rests does not extend to avoiding policies insuring property which is exempted by the laws of war from liability to be seized by the government of the insurer's country. While the rule would avoid a policy insuring the life of one who should become an actual and active enemy of such government, it thus acquiring the right to destroy his life, it would not affect the validity of an insurance on the life of a neutral, passive, non-combatant enemy, who remained such in fact, and over whose life there is no belligerent power on the part of the government of the insurer. Though, by his domicile, he is a technical enemy, so that his property may be lawfully captured as enemy's property, yet, as such nominal hostility does not subject his life, like his property, to peril, no belligerent right is affected by continuing the validity of the insurance."

Upon a question not touched in the New York cases, the court say: "In the application made in February, 1849, for the policy issued to Mrs. Goodman in March, 1849, Goodman is described as residing in Mobile, Alabama, and as being a wharfinger there. In his application of March, 1858, for the policy of 1858, and in that policy, he is described as of Mobile, in the state of Alabama. All the premiums that he paid were, with the knowledge of the defendants, paid at Mobile, to McCoy, their agent there, and were received by the defendants through and from McCoy. Goodman resided in Mobile from 1835 up to his death, and died at Mobile. In the absence of any proof to the contrary, the defendants must be held to have continued to understand that he continued to reside in Mobile. His application for the policy of 1858 was made through McCoy, at Mobile; the policy was delivered to him through the hands of McCoy, at Mobile, and bears McCoy's signature, as agent at Mobile; the three payments of premiums in 1859, 1860 and 1861, were made through McCoy, at Mobile, and the receipts

therefor bear the signature of McCoy as the defendants' agent. The policy contains on its face the words: 'Agents of the company are authorized to receive premiums when due, but not to make, alter, or discharge contracts, or waive forfeitures.' * * Considering the character of the contract, the circumstances under which it was entered into, the fact that Goodman was, with the knowledge of the defendants, a resident citizen of Alabama at all times, the fact that the contract must be regarded as having been entered into and continued in operation by the defendants, at least as long as they themselves recognized its continuance, that is, until March 2d, 1862, with reference to, and in subordination, on their part, to such statute law of the state of Alabama as should be enacted on the subject of their keeping agents in that state, and the fact that the agency of McCoy having been continued during the life of the policy up to March, 1861, was then withdrawn, it must, I think, be held, that the defendants were bound to keep in Alabama an agent to whom Goodman could pay his annual premiums, or could, at least, offer or tender payment, such agent to be appointed in conformity with such statute law, and that, if the absence of such agent was all that prevented the payment of such premiums by Goodman, the defendants are estopped from setting up the non-payment of such premiums at the times stipulated therefor as a defense to this suit." After referring in detail to the statute of Alabama as to foreign insurance companies, the court continue: "The policy in question was in fact issued in Alabama by the defendants to a citizen and resident of Alabama, although it professes to have been delivered as well as signed by the president and secretary of the company. The receipt by McCoy of the premium paid at Mobile March 2d, 1861, such premium having been received by McCoy as agent, under the authority to that effect on the face of the policy, made the contract of insurance, as respected the period to elapse before March 2d, 1862 (even if, as contended by the defendants, such payment of premiums created a new contract of insurance for a

year), an Alabama contract, to be governed by the statute law of Alabama. Such receipt of such premium by McCoy was ratified by the defendants. I think the proper construction of the policy, as such policy stood when the payment to be made March 2d, 1862, became due, is, that, inasmuch as Goodman was then living, and the obligation of the defendants under the policy was outstanding, the defendants were bound to furnish Goodman with an opportunity, on the 2d of March, 1862, and on every recurrence of the day of annual payment, to pay the premium to an agent of theirs in Alabama. As such payment to the agent would have been the transaction of insurance business in Alabama, the statute of that state required that the agency should conform to the statute. The defendants were bound to be ready to receive performance of the contract by Goodman through an agent in Alabama, such agent to be appointed in accordance with the Alabama statute. McCoy's agency in this case existed after that statute was passed. Such agency was withdrawn in March, 1861. Having been created before the war, it would not have been revoked by the war, at least so far as the right to receive payments of annual premiums was concerned. * * These views recognize fully all the terms of the policy, and do not interpolate in the contract of the parties, any provision, by way of excuse for non-payment on the stipulated day of any premium, which is not within the terms of the contract. It is of the essence of every contract, that, if one party to it prevents its performance by the other party, the former cannot be allowed to reap any benefit from the fact of such non-performance. In this case, the prevention, by the defendants, of performance by Goodman, was equivalent to actual performance by Goodman, or to a waiver, by the defendants, of such performance.

"But it is urged by the defendants that Goodman could have paid his premiums at New York; that, if he elected to remain in Alabama, where he could not or would not make payment of the premiums, it was his own fault; and that the

existence of the war, and the prohibition of commercial intercourse between the state of Alabama and the city of New York, furnishes no legal excuse for the non-compliance by Goodman with his agreement to pay the premium on the designated days. Yet the defendants insist, in their answer, that it was unlawful for them, between August 16th, 1861, and May 22d, 1865, to receive from Goodman any premium on their policy; and, on the argument, their counsel insisted, that if Goodman had, after the 16th of August, 1861, offered to pay the premiums as they fell due, it would have been unlawful for the defendants to receive such premiums. It was further insisted, that, notwithstanding this, the policy terminated because of such non-payment, for the reason, that the intervention of the war, as an excuse for non-payment, was not provided for by the policy. But these arguments are without avail to support the defendants' case. Their inability to receive the premiums, when due, in 1862, 1863, 1864, and 1865, amounts to the same thing as if such premiums had been actually tendered, and the defendants had refused to receive them. Such inability to receive was a dispensing by the defendants with the punctual payment of the premiums, and with their payment during the continuance of such inability, even if such payment be, under the terms of the policy, regarded as a condition precedent to the existence of the risk. Such inability was a default on the part of the defendants, preventing Goodman, a citizen and resident of Alabama, from paying the premiums to the defendants at New York, and, therefore, dispensing with the payment of them, as performance by Goodman.

"The case is not one where the excuse set up is merely inability or impossibility of performance on the part of him who is to perform. It is one where inability on the part of the party to whom performance was due, to receive such performance—an inability notorious and known to the party owing performance—existed, and is set up by the party to whom performance was due, as a ground for forfeiting the rights of the other party under the contract, because he did

not pay what it was impossible and unlawful for his obligee to receive. The cases in the books, which were cited on the part of the defendants as enforcing strictly the rule that a precedent condition on which, by contract, money is to be paid, must be absolutely complied with, were cases in which the impediment to performance existed solely on the part of him who was to be the actor in performance, and were not cases in which the impediment existed either solely on the part of him who was to be the recipient of performance, or was an impediment affecting both parties jointly and equally in extent. The distinction is a sound one; and it would be gross injustice to apply to this case a rule, the reason of which has no application to it." As to the premium due in March, 1866, after the close of the war, it was held that the refusal of the company when applied to, to recognize the policy, or receive the premium, rendered a tender unnecessary.[1]

§ 392. In Tait v. New York Life Insurance Co.,[2] contrary views are taken and supported with great ability and earnestness. The insured died in August, 1862, having after the outbreak of the rebellion tendered to the agent of the insured, through whom he had always paid his premiums the only premium which became due prior to his death, and the agent refused to receive it. In giving the decision the court say: "The acts by which alone the policy can be continued in life, involve not only the exercise of continuous active duties on the part of agents, but constant intercommunion across the hostile lines. Every receipt, in unambiguous terms, tells the insured no payment is good unless the party who claims the right to accept it holds an authenticated form, signed by the president, vice-president or actuary, which necessarily must be transmitted from the *home* office to the local agent from time to time as it is required. There is no general power to receive premiums without this special warrant, issued in each

[1] This decision was affirmed in the Supreme Court of the United States by an equally divided court.

[2] MSS. U. S. C. C. West Dist. of Tenn. per Emmons, J.

instance. The object of this precaution is manifest; it is so necessary to the prosecution of the scheme, and is so dependent upon regular communications between the agent and the chief officers, that when the latter are interrupted it necessarily follows that the payments, without an alteration of the contract, cannot be made. A life insurance agent who should not make his periodical returns and remittances would be an anomaly. Should a corporation fraudulently or negligently omit to forward the annual receipt in violation of duty under the policy, or by its wrong in any manner prevent performance on the part of the insured, different principles would apply, and a recovery at law or in equity according to circumstances be given. There are two main propositions upon which the controversy turns: *First.* Is the continued execution of a life policy inconsistent with political interests? *Second.* Is the payment of the premium during war a condition precedent to recovery? These two questions are all that are material to this decision.

"The general rule is, that all contracts and intercourse of every description are prohibited during war; and that those agreements, the execution of which increases the power of the enemy, are wholly annulled, and the parties reciprocally discharged from their performance. This generality would include the contract before us. But exceptions have been created to its application, and within these it is contended this case comes. Relying upon Denniston v. Imbria,[1] and Ward v. Smith,[2] it is said that debts are suspended, not discharged; and that this is but a debt. The distinction between the two is obvious. Where the consideration has been received and the obligation to pay is complete, no new act or volition and no continuing business activity is necesssary. By suspending all these the debt, without national injury, remains. Under a policy of insurance, when carried out according to the very intention of the parties, and in the only mode compatible with the financial scheme upon which it

[1] 3 Wash. 396.

[2] 7 Wall. 447.

depends, the most continuous and intimate business relations and intercourse are indispensable. No local agent ever is, or in common prudence can be, trusted for years to receive payments without remittance. Such is their number and widespread localities, that it has been found absolutely necessary to evidence their authority of receiving payment by periodical transmission of authenticated vouchers. These are never sent unless the home office has received full reports of the agent's doings and a satisfactory accounting for all the premiums before then payable. When a premium is tendered in due time, if any violation of the terms of the policy by the insured has become known to the agent, it is his duty to decline receiving the premium, report the circumstances to the home office and await instructions. And when a death occurs the important duty devolves upon the agent of receiving and transmitting to the home office the proofs required to show that the terms of the policy have been complied with by the deceased, and that his death did not result from any of the numerous causes excepted from guaranty by the policy. And although the agent has nominally no authority to allow or disallow a claim, he is, in fact, always relied upon to detect and report any suspicious circumstances which may exist in reference to the death or the character of the proofs, so that, to a very great extent, it rests with him to determine whether the claim shall in any case be contested. It is simply monstrous to suppose that the loyal members of this great scheme are compelled by law to confide this delicate function to a public enemy, who is to exercise it in favor of his fellows in rebellion. The rule would be as unjust as its exercise would be illegal. These forms and duties are well understood by the parties, and constitute a part of the contract between them, and are intended to be specifically and exactly performed. They cannot be so performed without much intercommunion across the lines. To dispense with them is to change the whole nature of the scheme, and involves an unprecedented and wholly unwarrantable interfenrece with the substantial terms of the agreement." The

court then urges that the reason why simple debts are held to be suspended only is "as purely a political and mercenary one as that which forbids the continued performance of an executory contract. It is in the interest of home commerce after peace," but while certain contracts are, on a balancing of benefits and evils, only suspended, others are absolutely abrogated, and the contract of life insurance is upon principle within the rule and the cases which apply to the latter. "A leading, if not the most important, motive for the prohibition, is to prevent the increase of the material power of the enemy. This is equally accomplished by the creation of a new debt, which constitutes a credit upon which the enemy can procure supplies, as by the creation of the products themselves. That this benefit to the enemy is the leading idea, and not solely the prevention of intercourse, is proved from the frequency with which every nation at war, from time to time, licenses trade with the enemy in such articles as its necessities demand. The assumption on the part of the government is, that all trade not so authorized is for the benefit of the enemy. At least, it invariably reserves the power, in all cases, of determining whether the trade will be of more benefit to itself than to the hostile government. This balancing of benefits is the test. While the whole power of the nation is exerted to cut off their supplies, and reduce to want and suffering the entire hostile nation, it would be absurd to suffer its efforts to be counteracted by allowing its subjects to perform agreements which would produce or increase what it is endeavoring to destroy; and this we understand to be the essence of the rule. It is wholly immaterial so far as this consequence is concerned, that the agreement is made, or the business relation created, before hostilities. * * A marked difference in the relations existing between enemies under this policy of insurance, and those of ordinary debtors and creditors is, that in the latter the obligation is full before the war. No new value or source of credit is placed in the hands of an enemy during its progress. Here, no obligation whatever exists, but a debt is created by much mutual

activity and elections between the parties. A source of credit, and a power of purchase with its proceeds, is thus originated. A value is created, which would have had no existence in the hostile country but for the action of one of the very enemies whose government has the power of seizing it. In the instance of a debt paid over to a local agent, no increased obligation, or value of any kind, is subordinated to the hostile state. The debt is equally in its power, whether in the hands of a debtor or paid over to the agent. The debtor only is changed, both residing in enemy's territory. They are so wholly unlike in their circumstances and in practical, financial results, that the same rule should not be applied to each. The accident in this case, that the rebel government did, in fact, confiscate all debts due from loyal citizens, would render the payment of these premiums unlawful, even if it be conceded that, had a different policy been pursued, it would have been otherwise. When the act of an enemy creates a value which, *eo instanti*, passes to the enemy's treasury, that it does so is an additional reason why it is unlawful to continue the agreement under which it took place.

"Among other reasons for not abrogating this contract, conspicuously urged in this series of judgments, is that the sum insured will not be paid till after the return of peace. It will not, therefore, it is said, furnish material aid to the enemy. This position is a concession that if it does so, it ought, upon principle, to abrogate the contract. But a thousand policies due against solvent companies are among the most certain sources of future payment which could be placed in the hands of our enemies. * * In three of the English judgments this argument was made at the bar, and was answered by the court, that the obligation was present capital in the hands of the enemy. And it was upon this reason, more than any mere intercourse which was promoted by the insurance, or anything in the nature of the subject-matter insured, that the judgments were rested. The leading idea in all these instances is, *benefit to the public enemy.* Subject-

matter of insurance or cause of loss is of comparatively little consequence. In the single instance of insuring one subject to be called into the army, there would, indeed, be the additional impolicy of making him more ready to go there. But in a case where the policy forbids military service, such conditions need not be considered. In all other instances, the financial result, the injury to the home government, and the additional power and source of credit given to the enemy, is precisely the same. Whether the insurance be upon ships, upon mills and manufactories in the enemy's territory, or upon the life of a non-combatant, and whether the property and life is destroyed by fire, tempest, or the casualties of war, through raids or sieges, the same sums, in precisely the same legal conditions, pass from the hands of loyal citizens to public enemies. It is impossible to discern, practically or legally, the slightest difference." The court then proceed to show from a long series of cases,[1] that all agreements between belligerents are unlawful, irrespective of intercourse, and that all such as involve the continuance of any active business relations, or of continuing responsibility for the acts or losses of an enemy, are dissolved by war, and add: "Irrespective, therefore, of the points hereafter considered, we should deny a recovery in this case, upon the sole ground that the contract became unlawful and was discharged the moment the parties became public enemies."

The court also holds that the failure to pay the premium when due terminated the contract, both because there was no absolute impossibility of payment, and because no case can be found where a complainant has been relieved from a failure to comply with conditions which he was under no obligation to perform, as is the case where the contract is unilateral. Its view is supported by a careful examination

[1] Griswold v. Waddington, 16 Johns. 438; Furtado v. Rodgers, 3 B. & P. 191; Potts v. Bell, 8 T. R. 548; Kellrer v. Le Mesurier, 4 East, 417; Gambla v. Le Mesurier, 4 East, 417; Brandon v. Curling, 4 East, 409; Esposito v. Bowden, 7 El. & Bl. 763; Avery v. Bowden, 6 El. & Bl. 953; *Ex parte* Boussmaker, 13 Ves. 71; Brown v. U. S. 8 Cranch. 110; The Rapid, 8 Cranch, 155; Scholefield v. Eichelberger, 7 Pet. 586; The William Bagaley, 5 Wall. 377; Coppell v. Hall, 7 Wall. 542.

of authorities. The financial results to which a contrary decision would lead are also considered, the court saying: "The only rational mode of contemplating the transaction is to consider all those who live in the loyal states as an aggregate insuring all those in the disloyal, and to administer such a rule as would do justice generally between the two classes. The 50 N. Y.,[1] 9 Blatchford,[2] and their associate judgments decide, that the body of members who punctually pay shall remain liable to such portion of those who do not pay as happen to die within the period of suspended payments; while they have not a farthing of claim on that great mass of other delinquents, who outlive this period, and refuse to pay their premiums after the war. The financial consequence is identical with that which would result from a deliberate selection and insurance by the officers of the company of a given number of lives which they knew would terminate within five years, and a rejection of a still larger number which it was known would pay premiums for an indefinitely longer period. * * The entire scheme depends upon the assumption of what is known to be true, that a small number only would die within a short period, while the far greater portion will live and pay premiums to a comparatively advanced age. These modern judgments cut the scheme in two, and say to all those who are public enemies, 'none of you need pay your premiums as provided in the contract; but those who happen to die are entitled to the full sum insured, deducting the premiums, while not one of your fellow-enemies is compelled to contribute a dollar for this purpose. The money shall be paid by loyal citizens alone.' The disastrous effects of such a rule of law upon a mutual insurance company, and the vital importance to them of the prompt payment of premiums by all for whom they stand guaranty, will appear by a simple illustration. It is well known that the whole scheme of life insurance is based upon the law of average. Out of a given number of

[1] Sands v. N. Y. L. Ins. Co.; and Cohen v. Mut. L. Ins. Co.
[2] Hamilton v. Mut. L. Ins. Co.

insured persons, statistics show there will be on the average a certain proportionate number of deaths each year; and in a mutual scheme the premiums to be paid each year by the whole number insured are fixed at such an amount as will make their sum total just sufficient to meet the losses arising from the average deaths during the year and to provide for unforeseen fluctuations of the law of average and other contingencies, including necessary expenses. Thus in a company consisting of one thousand persons insured for one year for $1,000 each, where the average number of deaths was fixed at ten, each member must pay a premium of $10, making in all $10,000 of premiums, in order to meet the ten death claims—supposing for the sake of simplicity that there are no expenses or fluctuations of average. The company would thus meet its liabilities and be solvent at the end of the year. Now, suppose it start the next year with the same number insured in like manner and on the same basis; but that five hundred of those who paid premiums in the former year suspend payment in this. Out of the five hundred who pay, the average number of deaths will be five, and the amount of premiums paid will be just sufficient to meet those losses, $5,000. But five also of those who suspend will die; and under the rule in question the company would be liable to their representatives for $5,000 of death claims less $53 50 of unpaid premiums and interest, with no means for meeting such a liability, and no claim whatever upon the survivors of those who suspend. If time were thus held not to be of the essence of these unilateral life insurance contracts, it is difficult to see how a mutual company can escape ultimate, if not speedy, bankruptcy. No one knowing such to be the law would pay a single premium after the first; but would suspend, and if he chanced to die within the time when the amount assured to him would exceed that of his unpaid premiums, his representatives would demand that excess; otherwise he would drop the policy; thus securing to himself all the benefit of his chances of death, while the company have no benefit of his chances of life after the first

year. * * If a single transaction only is looked at, and we omit to consider the fact that the payment of premiums is not obligatory and ignore the nature of the mutual scheme which is such that financial injustice of the grossest kind results from compelling the company to pay for those enemy delinquents who die, while few of those who survive pay their premiums at all—then beyond doubt, interest, if compounded, would seem to compensate mathematically for payment. But a moment's consideration will serve to show that it does not in fact compensate. These cases overlook the palpable difference to the company between assuming a *risk* and assuming a *loss*. The insurers are entitled to, and do have this interest (*i. e.*, the use of the money), where the contract is exactly carried out; and in a case where the insured is still living, and is in as good health as when the first unpaid premium fell due, we think interest would compensate on a renewal of the policy, because the risk is then the same as would have been taken had the premium been promptly paid. But where the health of the assured has failed or death has occurred, the insurers are called upon to accept a greater risk or an absolute loss, upon the same terms on which they agreed to accept the risk contemplated by the policy. The ruling of these cases compels the insurers to assume a *loss* for precisely the same consideration which the policy awarded them for assuming a *risk*. But such a consideration is wholly foreign to the necessities of this argument. A policy of life insurance is a part of an indivisible scheme, incapable of existence as an isolated transaction; and all arguments which consider it otherwise are but misconceptions of its true nature."[1]

§ 393. Where a resident of Virginia insured his life in an English company, but through a local agent in that state appointed by the general agent in New York, and after the breaking out of the rebellion paid his premiums to the agent

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[1] Dillard v. Manhattan L. Ins. Co. 44 Geo. 119, is to the same effect. Also Stephens v. N. Y. L. Ins. Co. Superior Ct. of Baltimore, MSS.

in Richmond, who had been by parol authorized to receive them, it was held[1] that the company was liable; that the dealings were between a neutral and an enemy and not illegal, and that, as the authority to the local agent was without specified directions as to what he should receive the premiums in, it was "a general authority to him to collect the premiums accruing in the defendant's favor upon the policies which it had previously issued. And this authority, under the well settled principles of the law of agency, the agent became bound to his principal to make use of according to the ordinary course of the business he was employed in, and the settled usages, if any were found to exist, relating to the subject. He could not, therefore, bind his principal or satisfy the powers of his agency by accepting property for the premiums, for that would convert the power to receive payment merely into an authority to traffic in merchandise. But from the nature of the power to receive payment the agent necessarily derived the authority to accept whatever was generally used for the purpose of making payments in the locality where the debts were to be collected. * * His duty, as well as his authority, was to collect the debts maturing in favor of the defendant. How that could best be done was necessarily left to his own prudence and judgment. * * Soon after the agent at Richmond was directed to collect the premiums without renewal receipts, the actual currency of that locality was supplanted by Confederate notes of the insurrectionary government. Although not made a legal tender for the payment of debts, all other species of currency was soon driven out of circulation by them. And after that they were the financial means used for buying and selling property, and for creating and discharging debts; and while that was their character, and the premium upon gold and foreign exchange was not far above them, they were received by this agent in payment of the premiums due on this insurance. The uncontradicted evidence given in the

[1] Robinson v. Internat. L. Ass. Soc. 52 Barb. 450.

case is that these notes were issued soon after the passage of the act providing for them, which was on the 19th of August, 1861. And from that time they passed equal to bank notes, and during the residue of 1861, and through 1862, they were known as Confederate money, and passed almost at par at Richmond. The acceptance of this currency as payment of the premiums upon the policy in suit, spurious and unlawful as the currency itself was, very materially differed from the acceptance of payment in property, or in counterfeit notes, or the notes of insolvent banks. For the acceptance of property was not within the spirit or scope of the agency, and the bills of insolvent banks and counterfeit notes would be wholly devoid of value, and, therefore, no payment whatever in any just sense of that term. But these notes were not of that description. For they had a circulating value at the time the agent received them, and were used for all the ordinary purposes of currency. * * From the nature of the power which the jury have necessarily found was conferred upon him, the circumstances that must have been expected to attend the execution of it, the emergency he afterwards encountered when the previous currency of his State was practically excluded from circulation by that which was issued by the Confederate authorities, the premiums upon this policy were in judgment of law paid when the defendant's agent received the amount due for them in these notes. It was the only feasible mode, under the circumstances existing at that time, in which the premiums could be collected by him, and as it had been made his duty to obtain their payment, he was necessarily authorized to receive it in that manner. But even if that authority were not a necessary incident of the power conferred upon him, still, as he was authorized to collect the premiums, his acceptance of Confederate notes for the amount of them discharged the assured. For, under the circumstances existing at the time when the authority to collect was conferred upon him, it could neither have been expected nor intended that the identical currency received by him should be remitted to the general agency at

the city of New York. This currency, although valuable at Richmond, was worthless at New York. The only mode, therefore, in which the value it had at Richmond could be transmitted to New York was by purchasing gold or foreign exchange with it, and it appears from the evidence that it was capable of being so used. In addition to this, the course of business previously established between New York and the Richmond agency was for the agent at the latter place to make up his accounts and remit his collections once in each month, which was inconsistent with the obligation or expectation that the identical moneys received by him were to be remitted to the agency at New York. On the contrary, the notorious and general course of business, in cases of that description, was to purchase exchange with the local currency, and in that manner transmit its value to the place to which it was to be forwarded. Not only the state of public affairs, but the customary mode shown to have been adopted in the transaction of this business, also indicate that it could not have been intended that the local currency used and received for the payment of debts at Richmond should be remitted in kind to New York. On the contrary, this was received for the convenient transaction of the agent's business at the place where it fulfilled all the purposes and offices of a monetary currency. And accompanying its receipt was the corresponding duty to invest it in such funds or commercial paper as would enable him to transmit its local value to the general agents, whose business was carried on at a place where that local value had no existence. Under this relation and obligation of the local agent he became the defendant's debtor for the value of the Confederate currency at the time and place when and where it was received by him. And that obligation can only be effectually discharged by transmitting or paying that value in lawful money or its equivalent to the defendant's general agents at the city of New York. By the acceptance of the premiums in Confederate notes the agent discharged the assured, but at the same time, under his obligations arising out of the

peculiar circumstances of the case and the previous course of business between himself and the defendant's general agency, he became the defendant's debtor for the amount received, with the duty of remitting it in such a manner to the general agency at New York as to transfer the full local value for the time being received by him to such agency."

This decision was affirmed by the Court of Appeals.[1] The court there say: "The defendant is an incorporation, organized under the authority of the British Parliament, for the purpose of making insurance upon the lives of individuals. To carry on this business in the United States, it established an agency in the city of New York, of which Mr. Holbrook and Mr. Habicht were the chief managers. They were assisted by certain other persons, residents of the city of New York, and together formed a board of directors, exercising substantially all the powers of the company in this locality. They issued policies and paid losses and appointed agents upon their own motion. They exercised all the powers that agents could well exercise, and, it may be assumed, without control or interference by the directors in England. They were general agents, intrusted with unlimited authority. It is important to observe that the New York board were but agents, however general their character or unlimited their authority. The principal was the company itself, in England. That principal could at any moment have revoked the powers of these New York agents, so far as the agents themselves were concerned, and assumed all its original authority. * * The defendant was a British incorporation, organized by virtue of an act of Parliament, carrying on its business in London, as its home office, and doing business also in this state, strictly and professedly as a foreign corporation. Whether its business here is transacted by one agent or many, and whether such agent has extended or restricted authority, can have no effect upon the domicil of the company. Residence and agency have no connection with

[1] 42 N. Y. 52.

each other. * * This was a contract between a citizen of a neutral country and a citizen of a belligerent country. No authority is adduced to sustain the proposition, that this state of things annuls or suspends a power of attorney to receive premiums on a policy of insurance. It is supposed that no such authority can be cited, but that the law is to the contrary. * * The status of the defendant was simply that of a neutral contracting or continuing a contract with a citizen of a belligerent country. Such contracts are valid by the laws of all countries, and goods to be delivered under such contracts are exempt from seizure by hostile cruisers, except when they are articles contraband of war. * * The appellant's counsel further insists that Cowardin had no authority to receive payment of the premiums in 'Confederate money,' and that the payment in that medium was in no legal sense a payment of such premiums. It appeared from the evidence that Cowardin had, from the outset of his agency, received payment of all the premiums paid by fifty or sixty different persons in the currency of the country; that, as received, he deposited the same to his own credit in the bank, and at stated periods, after deducting his commissions, remitted the balance to the directors in New York by a draft, payable there. He continued this practice in 1861 and 1862 as to the manner of receiving payments. The communications been New York and Richmond, for all business purposes, were entirely cut off; no remittances could therefore be made at that time. It appeared that the Confederate currency began to be issued in July, August, and September, 1861. At the date last named it was equal in value to the circulating bank notes of Virginia, and about five per cent. below gold, and it soon became the almost exclusive circulating medium of the country. It is contended that this circulation was not money, for the reason that it was issued by a rebel government, that it had no legal validity, that it was no better payment than if counterfeit money had been received by Cowardin. This question must be decided upon the condition of things as they were, and as they appeared, in 1861

and 1862, and not as we find them now, in 1870. * * Under such circumstances, it is quite unreasonable to say that Cowardin had no authority to receive the payment in Confederate money of the premiums due to the company, and that it was no better than counterfeit money. It was a currency issued by the authority of an existing, *de facto* government, which had adopted a constitutional form of government, and was fully organized under it, which had in the field large armies, had won many battles, had invaded the states of the North, had besieged the national capitol, was recognized as a belligerent power soon after by the British government, and which had, from the outset, been treated as a belligerent by the government of the United States, and which was itself confident of maintaining its existence. It is true that these notes are now valuable only as relics of a past existence. It was, however, nearly four years after the occurrences we are considering before this result became certain, and we cannot transport our knowledge backwards, and by its use condemn as base and worthless, a currency which was then in general use, and might become permanently valuable."

§ 394. In connection with the question we have been considering naturally arises that of the effect of the ordinary provision of policies, against entering the military service. It has been presented in several cases arising out of the rebellion. In Mitchell v. Mutual Life Insurance Co.,[1] the plaintiffs brought their action as assignees of a policy upon the life of one Snowden, they having taken it as security for a debt shortly after its issue in 1856, and paid the premiums after that time. It appeared that the insured shortly after the outbreak of the rebellion "went South," and died there in 1864. The payment of the policy was resisted on the ground that he went within the forbidden limits south of the parallel fixed in the policy, and also that he entered the military service. It was claimed for the plaintiffs that the

[1] Superior Ct. of Baltimore, not reported.

insured did not, within the meaning of the clause of the policy, enter the military service, as he had no commission, though he served on the staff of several generals. The court say: "In reference to the avoidance of the policy by the assured having entered into what is termed military service, there stands behind that question a great principle of public law, upon the enforcement of which may depend the very life of the government under whose auspices we live, and by whose powers we are all protected. And if any other proposition were established than that which I now seek to enforce, then if a time should again come when this country shall be * * involved in a war, and a power is conferred upon these great insurance companies to protect from the loss arising from the fall of the enemy in the field, you place your government in a position calculated to nerve the arm of your enemy. What would be the character of such an insurance as it would appear upon the face of the contract? If, in this policy of insurance, after providing that the party insured should not pass beyond a designated line, and that he should not perform or engage in other specified acts, it had been added, 'but, although there may be war between the United States and the Queen of England, yet, if this insurance company should insure against the loss of life a subject of the Queen engaged in such hostilities, the policy shall, nevertheless, not be void,' can it be pretended for a moment that a contract of that kind could be maintained? What would you propose to cover by such a contract of insurance? Not merely that the insured may engage in some contraband or illicit trade prohibited by statute, but you insure the life of a belligerent soldier. * * The paper becomes void the moment the assured connects himself, in any form, with the belligerent force, or even becomes a member of the belligerent government, because the thing insured is the life of a soldier, or that of a citizen residing within the belligerent lines, and subject, therefore, at all times and under all circumstances, to be commanded by the powers that control the operations of your enemy. * * * In order to prove

military service, I certainly would not impose upon the party the necessity of producing a commission. The commission is only evidence of the rank and position of the party holding it."[1]

Where the assured stated that he had not been in any military service, and it appeared that he had been a chaplain in the army, it was held that in default of evidence it could not be assumed that that was "in the military service," and proof of employment in such service must be given.[2]

In Smith v. Charter Oak Life Insurance Co.[3] it was held that it was the duty of an agent in the rebellious states to receive a premium, when tendered him during the war; and that a refusal so to do constituted a present breach of the covenants in the policy, and gave the assured a right of action for damages against the company; and that the measure of damages was the value of the policy at that time, and that the amount of such damages could be in no way affected by the fact that the insured subsequently entered the military service in violation of one of the conditions of the policy.

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[1] In Dillard v. Manhattan Life Ins. Co. 44 Geo. 119, it appeared that the insured accepted the appointment of brigade post-quartermaster, to avoid conscription, and the point was taken, but not decided, that this was a violation of the condition against entering the military service.

[2] Mut. Ben. L. Ins. Co. v. Wise, 34 Md. 582; s. c. 1 Ins. Law Jour. 430. As to the effect of war upon the provision requiring an action to be brought within a limited period.

[3] Central Law Jour. Feb. 12, 1874. To same effect, Hancock v. N. Y. L. Ins. Co. 2 Ins. Law Jour. 903, U. S. C. C. East. Dist. of Va.

CHAPTER XV.

INSURANCE AGAINST ACCIDENTS.

§ 395. **General Rules of Law the same as in Life Insurance.**—Insurance against accidents has become an established branch of business, both in this country and in England. It is usually a contract by which the company agrees to pay a stipulated sum per week during disability caused by accident, and a gross sum in case of death by accident. There are various modifications, some insurances including all classes of accidents, and some only accidents of a specified nature. As a general rule the law of accident insurance is the same as that of life insurance, except that it is much simpler. In many cases in this country there is no policy, but only a brief ticket sold to all applicants, who make a verbal application, and of course give no warranty, and make no representation. In such cases the only question that can arise is whether the accident was of a nature covered by the contract, and whether it happened during its continuance. In other cases there is an application, in a form similar to that for life insurance, accompanied with representations and warranties. In such cases the same rules apply as in life insurance. The rules as to the inception of the contract,[1] the powers of agents, waiver and interest,[2] are the same. The

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[1] Rhodes v. Railway Pass. Ass. Co. 5 Lans. 71.

[2] Prov. L. Ins. & Inv. Co. v. Baum, 29 Ind. 236, was a case of accident insurance, where the question of interest was raised. Simpson v. Acc. Death Ins. Co. 2 C. B. N. S. 257, *ante*, § 195, was a case of accident insurance where the question of nonpayment of premium was considered. An able writer, in an exhaustive article upon accident insurance, in 7 Am. Law Rev. 585, says, "Accident insurance in this country began with the sale of 'accident tickets' to travelers on railroads. They were of three classes, insuring the passenger, first, against accidents to the conveyance; second, against all sorts of accidents while traveling by public conveyance; third, against all accidents set forth in the contract, without reference to conveyance, mode of travel, or occupation. These tickets were sold at railroad stations. * * These tickets cover only a specific journey or a

same rules apply also to proofs of death; the policy, however, usually contains some provision requiring the proofs to show that the death arose from an accident, and its nature. Where the policy embraces a liability for injuries not fatal, a provision for notice is generally inserted, and prompt compliance with it is required, in order that the company may be able at once to investigate the facts. But provisions of this nature are liberally construed.[1] Where the policy provided that no payment should be due on account of the accidental loss of life of the assured, unless notice of the injury, and of the death should be given within thirty days, and sufficient proof furnished of such injury, and that such death was caused solely thereby, the jury found that while the assured was pitching hay, the handle of the pitchfork slipped through his hands and struck him on the bowels, inflicting an injury which produced peritoneal inflammation, in consequence of which he died, and that the blow which he received from the fork handle was an accident and the cause of his death; and it appeared that notice was given the company that the assured came to his death by accident on the 14th of July, by

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short period of time, and contain the same general provisions as the common policy. The policy grants a limited insurance. It insures either indemnity for injury by payment of a specified weekly allowance during the time the insured is disabled by the injury, or compensation for death by payment of a fixed sum, if the insured dies in consequence of an accident. These two forms of insurance are issued separately, or in a joint policy covering both indemnity and compensation. The policy now in use covers all 'bodily injuries effected through *external, violent, and accidental means.*' Indemnity is limited to twenty-six weeks, and exception is expressly made against all forms of disease, drunkenness, duelling, suicide, self-inflicted injuries and wilful exposure to unnecessary risk. Formerly the word 'external' was not inserted, but now, in order to guard against frauds, the injury must be from some external means, and produce a visible injury. Death must occur within ninety days from the happening of the accident, to entitle the insured to compensation; and indemnity is not earned except it totally disables him from prosecuting any and every kind of business for the continuous period for which it is claimed. These are the peculiar provisions of an accident policy, which otherwise resembles an ordinary life policy, though in its effect and analogy, accident insurance more closely resembles fire insurance than life insurance, and is truly a provision for indemnity, except in cases of death, when it becomes a contract to pay a fixed sum of money upon the happening of death caused by accident."

[1] Prov. L. Ins. Co. v. Martin, 32 Md. 310; *ante,* § 238; Prov. L. Ins. & Inv. Co. v. Baum, 29 Ind. 236; and Railway Pass. Ass. Co. v. Burwell, 3 Ins. Law Jour. 281; *ante,* §§ 258, 259, are cases in which the question of notice under accident policies was raised; see also Gamble v. Acc. Ins. Co., 4 Irish C. Law, 204; *ante,* § 257.

an injury received in the bowels while working in a hay field, producing peritoneal inflammation, which resulted fatally; while the affidavit of the plaintiff, subsequently furnished, averred that the insured died in consequence of an accident, which happened on the 9th day of July, in this wise: he was assisting in unloading hay, at his grandfather's, when he accidentally strained himself; that he immediately complained of severe pain, and a physician was summoned, but that he died five days after the accident, which was the direct cause of his death. The attending physician stated that he was killed by accident, occasioned by exertions made in assisting in hauling in hay, which injured the abdominal muscles and produced peritoneal inflammation and all its concomitant symptoms, which resulted in his death. It was held that the facts, as stated in the affidavits, make out a *prima facie* case of death resulting from an injury, accidentally received; that the preliminary proof furnished by the plaintiff must be regarded as sufficient, and that "the plaintiff is entitled to recover if she has given sufficient preliminary proof of the injury, though she may have unwittingly ascribed it to a wrong cause."[1] Where the policy provided that full particulars of the accident and injury should be furnished to the insurer, without suppression of any material fact, a failure to disclose injuries happening subsequently to the accident, by which the original injury was aggravated, was held not to be the suppression of a fact within the meaning of the contract.[2] A misstatement as to residence made on procuring an accident insurance is not material.[3]

§ 396. **What is an Accident?**—An accident has been variously defined as the happening of an event without the aid and without the will of the person by whose agency it was caused, an event which takes place without forewarning or expectation, a chance or casualty, a contingency, that which

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[1] N. Am. Ins. Co. v. Burroughs, 69 Penn. St. 43; s. c. 1 Ins. Law Jour. 90.

[2] Rhodes v. Railway Pass. Ass. Co. 5 Lans. 71.

[3] Tooley v. Railway Pass. Ass. Co. 3 Biss. 399; s. c. 2 Ins. Law Jour. 275.

takes place without any intelligent or apparent cause, without design, and not according to the usual order of things;[1] an unusual and unexpected result attending the performance of a usual and necessary act; an event which takes place without foresight or expectation;[2] any unexpected event which happens as by chance, or which does not take place according to the usual course of things;[3] any event which takes place without the foresight or expectation of the person acted upon or affected by the event.[4] Some violence, casualty, or *vis major* is necessarily involved.[5] It means, in short, an injury which happens by reason of some violence, casualty or *vis major* to the assured, without his design or assent or voluntary co-operation,[6] an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; it may happen from an unknown cause, but it is not essential that the cause should be unknown.[7]

§ 397. **Injuries from Personal Violence are Within Policy.**— In a case where the insured was attacked by highwaymen, while pursuing his journey on foot, a question was raised as to whether this was an accident. The court say:[8] "The injuries were effected by violence, but was there any accident? * * Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design and is expected is a foreseen and foreknown result, and, therefore, not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the

[1] Mallory v. Trav. Ins. Co. N. Y. Supreme Court, reported on appeal, 47 N. Y. 52.

[2] Prov. L. Ins. and In. Co. v. Martin, 32 Md. 108.

[3] N. Am. L. & Acc. Ins. Co. v. Burroughs, 69 Penn. 43.

[4] Ripley v. Railway Pass. Ass. Co. 2 Bigelow L. & Acc. Cas. 738.

[5] Cockburn, C. J., in Sinclair v. Maritime Pass. Ass. Co. 3 El. & El. 478.

[6] 7 Am. Law Rev. 588.

[7] Schneider v. Prov. L. Ins. Co. 24 Wisc. 28.

[8] Ripley v. Railway Pass. Ass. Co. 2 Bigelow L. & Acc. Cas. 738. The decision in this case was affirmed by the Supreme Court, but the decision below having been in favor of the company on another point, this question was not passed upon. 16 Wall. 336; s. c. 2 Ins. Law Jour. 538.

event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and, in the more popular and common acceptation of the word, 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon, or affected by the event. A man goes to a livery for a horse and carriage, and is given one. But the horse is sure to run away if he is driven. This the livery man knows; the hirer does not. The horse is taken, driven, and runs away, injuring the hirer. Now the event was foreseen and expected by the owner of the horse, but unforeseen and unexpected to the hirer, and, therefore, it seems to me it was accidental to him, and within view of this policy would be regarded an accident. A man throws a train of cars off the track, and one or more passengers are injured or killed. To those in the cars it is an accident, a casualty, while in the exact sense, murder is not an accident. I think in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well know, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract, as a large class, not versed in lexicology, are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called accident. The company fix the terms of this contract and are to be held, in the absence of plain and unequivocal exceptions and provisos, to intend what in popular acceptation the insured party is likely to understand by its terms. This question is not, perhaps, entirely free from doubt. I find no case in which the exact point has been decided."

In a case in which the facts have been already stated,[1] the court say: "It is said, that if the assured strained himself while unloading hay, it was not an accident insured against within the meaning of the policy. Why not, if he *accidentally* strained himself, as is averred in the plaintiff's affidavit? Why is not death resulting from an accidental strain as much within the meaning of the policy as death produced

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[1] N. Am. L. & Acc. Ins. Co. v. Burroughs, 69 Penn. 43; *ante*, § 395.

by any other accidental cause? If the injury be accidental, and the result of it death, what matters it whether the injury is caused by a strain or blow? * * And there is no more reason for regarding an injury of the abdominal muscles, caused by an unexpected blow, an accident, than an injury caused by a casual and unlooked-for strain. If the death of the assured resulted from an accidental strain, then it was not 'caused by natural disease.' And if it resulted from any accidental strain, it does not follow that it was caused by 'unreasonable imprudence,' or 'the doing of an unlawful act.'"[1]

§ 398. **Rupture Caused by Jumping from Cars or Running is not an Accidental Injury.**—The Connecticut Reports contain a case decided by Judge Shipman of the United States District Court as arbitrator,[2] in which a claim was made by Southard against the company for injuries received by him, by reason of which he was totally disabled for a considerable time, and prevented from the prosecution of any and every kind of business. The following questions were submitted to the arbitrator: Did the alleged injury result from accident within the meaning and intention of the contract? Was the disability a consequence of disease existing prior or subsequent to the contract? Is it a case of total disability from all kinds of business? The insurance was against accidental loss of life, in the principal sum of five thousand dollars, to be paid "after sufficient proof that the insured, at any time within the term of this policy, shall have sustained bodily injuries, effected through violent and accidental means, within the intent and meaning of this contract and the conditions hereunto annexed, and such injuries shall have occasioned death within ninety days from the happening thereof; or if the insured shall sustain bodily injuries, by means, as aforesaid, which shall absolutely and

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[1] N. Am. Life & Ac. Ins. Co. v. Burroughs, 69 Penn. 43. To same effect, Martin v. Trav. Ins. Co. 1 F. & F. 505.

[2] Southard v. Railway Pass. Ass. Co. 34 Conn. 574.

totally disable and prevent him from the prosecution of any and every kind of business, then on satisfactory proof of such injuries, he shall be indemnified against loss of time in a sum not exceeding twenty-five dollars per week for a period of continuous total disability not exceeding twenty-six consecutive weeks from the time of the accident and injuries as aforesaid." To this main clause of the policy there were attached certain provisions and conditions, one of which was that the insured was to use all due diligence for personal safety and protection. On the day of the injury, the insured went to the depot at Newcastle, to meet an acquaintance. After getting on the train, he learned that there were two depots at that place, one about three quarters of a mile distant, and that there was probably some misunderstanding as to which depot the interview was to take place at. He therefore jumped off from the rear end. He felt no shock, and walked briskly to the other depot. He remained there till about time for the next train, and then returned to the first depot. While going back, he heard what he supposed to be the train coming, started suddenly, and ran to where he could see, and found that it was not the train, when he walked the rest of the way to the depot, took the cars and returned to Philadelphia. Some time during the journey from Newcastle to Philadelphia, and on the same day, he felt pain about one knee, but did not refer it to his movements at Newcastle. After he arrived at Philadelphia, and had transacted some business, he called on a physician, who found a partially developed rupture on his right loin. Southard then referred it to his jumping off the cars or to his running at Newcastle. This rupture increased, and finally, for several weeks, disabled him from business. For this disability he claimed a weekly compensation for the time it continued. The company denied that it was within the scope of their contract. Shipman, J., says: "The policy is one of indemnity against 'bodily injuries effected through violent and accidental means, within the meaning of this contract, and the conditions hereto annexed.' Had the terms of the

contract stopped at the words 'violent and accidental means,' there would be no difficulty, in my judgment, in disposing of the questions; for there was no *accident*, strictly speaking, in the *means* through which the bodily injury was effected. It would not help the matter to call the injury itself, that is, the rupture, an accident. That was the result and not the means through which it was effected. The jumping off the cars or the running was the means by which the injury was caused. Both were done by the claimant voluntarily, in the ordinary way, with no unforeseen, accidental, or involuntary movement of the body whatever. There was no stumbling, or slipping, or falling. There was nothing accidental in his movements, any more than there was in his passing down the steps of his hotel, or in his walking on the street, during each of which he might have had a stroke of apoplexy or a hemorrhage, a rupture of a blood-vessel in the head or the lungs. True, in jumping from the cars and running, there was more violence, or, properly speaking, more force; but there was no more accident than in any ordinary movements of the human body. How, then, admitting the rupture to have been effected by jumping from the cars or by running to see if they were coming, can it be said that it was caused by *accidental* as well as violent means? All the accident there was, was the result of ordinary means, voluntarily employed, in a not unusual way. But the words 'violent and accidental means' are followed in the policy by the words 'within the intent and meaning of this contract and the conditions hereunto annexed.' Now, we are to consider how far the former words are qualified by the other parts of the contract, or by the conditions thereto annexed." After citing various exceptions contained in the policy, he says: "It may be said that this specific exclusion from the scope of indemnity of death or injury happening from causes and under circumstances expressly set forth, leaves, by fair implication, death or injury from all other causes and under all other circumstances included in the contract of indemnity; thus logically inverting or complementing the maxim *expres-*

sio unius est exclusio alterius. But in applying this well-known rule of construction, reference must be had to the main body of the contract and to its subject-matter. It is not, nor does it purport to be, a contract of indemnity against death or injury effected by all means. The cause of death or injury must in all cases be 'violent and accidental,' or the event is without the scope of the contract. The instrument by its terms embraces only cases where the elements of force and accident concur in effecting the injury. The cases excluded are only those which belong to the same class. The contract declares to the insured that though he may be killed or injured through violent and accidental means, yet if the calamity occurs under certain circumstances the insurers will not be liable. Violent and accidental death or injury might occur, and often does occur, under the circumstances enumerated in the excluding clause. The contract, as I have already intimated, in its broadest scope only embraces within its indemnity personal injuries effected through forcible and accidental means; and the proviso simply excludes from this class of injuries all that occur under the circumstances enumerated. All others of this class are included. The degree of violence or force is not material; and had the insured in this case, in jumping from the car, lost his balance and fell, or struck upon some unseen object and wounded himself, or in running had stumbled or slipped on the ice, his injury might be attributed to accidental as well as violent means, and, assuming that there was no want of due diligence on his part, his misfortune would have been covered by the policy. But as I have already stated, the injury which he received was in no sense the result of accident. He jumped from the car with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect on the ground, just as he intended to do. So in running. He ran from no peril or necessity, but for his own convenience, voluntarily, and from all that appears, without stumbling, slipping, or falling. In both cases he accomplished just

what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control. All that he claims is that, some hours after, it was discovered a muscle in the walls of the abdomen had given way under the strain to which he had voluntarily put it under circumstances free from all peril or necessity. Assuming that this rupture was caused either by his jumping, or running, or both, does not help the matter unless we call running and jumping accidents. I, therefore, am of opinion that the alleged injury did not result from an accident, within the meaning of the contract."

§ 399. **Sunstroke not an Accident.**—In Sinclair v. Maritime Passenger Assurance Co.,[1] a company established for insuring against loss of life and personal injury arising from accident at sea insured the master of a ship then about to proceed on a voyage, whereby it was agreed that in case the insured "should sustain any personal injury from, or by reason or in consequence of, any accident which should happen to him upon any ocean, sea, river, or lake," the company should pay him a reasonable compensation for such injury, and in case he should die from the effects of such injury, within three calendar months from the occurrence of the accident, should pay the sum insured to his representatives. It was further agreed by the policy that no compensation should be payable either to the insured or his personal representatives, in respect of any injury to which he should knowingly and without some adequate motive expose himself; but it was declared that, with those exceptions, the policy was intended to secure compensation to him or his representatives, "in the event of his sustaining any personal injury during the said intended voyage, from, or by reason, or in consequence of, any accident whatsoever." He was struck down by a sunstroke, to which he did not know-

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[1] 3 El. & El. 478.

ingly and without adequate motive expose himself, and from the effects of which he died on the same day. It was held that the defendants were not liable, because his death could not be said to have arisen from accident, within the meaning of the policy. Cockburn, C. J., says: "The question is, whether under such circumstances the death of the deceased can be said to have arisen from accident, within the meaning of the policy. We are of opinion that it cannot. * * It is difficult to define the term 'accident,' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume that, in the term 'accident,' as so used, some violence, casualty, or *vis major*, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless, at all events the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes. In the present instance the disease called

sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected and so died. We think for the reasons we have given, that his death must be considered as having arisen from a 'natural cause,' and not from 'accident,' within the meaning of this policy."

In a recent case which was compromised before reaching a decision, one of the questions involved was, whether freezing to death in an ascent of Mount Blanc was an accident within a policy insuring against death from external, violent, and accidental means, and which did not include any means of which there was no external and visible sign. As to this case it has been forcibly said:[1] "That freezing is an accident where it occurs without want of due care and needless exposure by the insured, would seem to follow from the analogy of drowning, or of suffocation by gases in a coal mine, or carbonic acid in a chamber. The effect of exposure to the heat of the sun is hardly analogous. Sun-stroke is a specific disease, and is as positive an affection of the brain as apoplexy or paralysis. Sinclair's case and the dicta therein do not apply to death from atmospheric causes, where no specific disease is produced; and the argument that death in Dr. Bean's case was not an injury of which there was any external and visible sign, is answered by denying the fact. The frozen body was itself a visible sign of the injury. Frost in the corporeal tissues and ice in the arteries are as visible signs of injury as extravasated blood around the spot where a blow is struck."

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[1] 7 Am. Law Rev. 592.

§ 400. **Contributory Negligence as a Defense.**—How far an injury ceases to be accidental within the meaning of the policy because there was contributory negligence on the part of the insured is an important question. Many of the policies now in use contain a clause upon the subject. It was held in an early case in Kentucky, in which there was no provision upon the subject in the policy, but where the insurance was against any personal injury not fatal,[1] "that if a party causes or contributes to the accident, the company is not liable. And, therefore, where the insured inadvertently put his arm out of the window of a railroad car, and it was hit by a post, so that he was disabled for many weeks, as the accident was produced by his fault, and resulted from the dangerous position in which he had needlessly and negligently placed his arm, and which, if not to be expected from the position in which he placed it, was at least probable, and as it did not result from any of the dangers common to passengers upon that and other railroads, he had deprived himself of all right to compensation." No reasons are given for the opinion, and, as has been well remarked,[2] "the decision is against the weight of authority, and is entitled to little consideration, for it stands unsupported either by reasoning or precedent." The more correct view is that adopted in Maryland, where it is held,[3] that though the negligence or carelessness of the assured is a defense in an action of tort founded on the defendant's negligence, it is not so where the liability sought to be enforced is created by a contract which does not specifically provide that the assured shall exercise diligence. And substantially the same view is adopted in New York.[4]

In an action to recover on an agreement to insure against inability to labor arising from accidental injuries, the in-

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[1] Morel v. Miss. Valley L. Ins. Co. 4 Bush, 535.
[2] 7 Am. Law Rev. 594.
[3] Prov. L. Ins. & Inv. Co. v. Martin, 32 Md. 310.
[4] Champlin v. Railway Pass. Ass. Co. 6 Lans. 71.

temperance of the insured is wholly immaterial, unless it contributed in some degree to cause the injury, as where the intemperance was shown to be subsequent to the accident.[1]

§ 401. **What is and What is not due Diligence and Wilful Exposure.**—In a Wisconsin case[2] the policy contained a clause that the company should not be liable for any injury happening to the insured by reason of his "wilfully and wantonly exposing himself to any unnecessary danger or peril." The insured attempted to get on a train of cars while in slow motion, fell under them, and was killed. On the trial the plaintiff was nonsuited, upon the ground that the death was within this exception. On appeal, the court say: "The position most strongly urged by the respondent's counsel in this court, was, that inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word accident, which has never been established, either in law or common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured which contributes to produce them. * * Yet such injuries, having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so. * * There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result. * * It may be an unusual result of a known cause, and, therefore, unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident. It is true that accidents often happen from such kinds of negligence; but still, it is equally true that they are not the usual result. If they were, people would cease to be guilty

[1] Rhodes v. Railway Pass. Ins. Co. 5 Lans. 71.

[2] Schneider v. Provident L. Ins. Co. 24 Wisc. 28.

of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. * * So there are, undoubtedly, thousands of persons who get on and off from cars in motion without accident where one is injured; and, therefore, when an injury occurs, it is an unusual result, and unexpected, and strictly an accident. * * The question whether the injured party was guilty of negligence contributing to the accident does not arise at all in this class of cases. * * The only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and, if so, whether it was within any of the exceptions. This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence, falling short of wilful and wanton exposure to unnecessary danger, would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning, in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

"The question, therefore, remains, whether the attempt of the deceased to get upon the train was within this provision, and constituted a 'wilful and wanton exposure of himself to unnecessary danger.' I cannot think so. The evidence showed that the train, having once been to the platform, had backed so that the cars stood at some little distance from it. While it was waiting there, the deceased was walking back and forth on the platform. It is very probable that he expected the train to stop there again before finally leaving. But it did not. It came along, and while moving at a slow rate, not so fast as a man would walk, he attempted to get on, and by some means fell either under or by the side of the cars, and was crushed to death. The act may have been imprudent. It may have been such negligence as would have prevented a recovery in an action

based upon the negligence of the company if there had been any. But it does not seem to have contained those elements which could be justly characterized as wilful or wanton. The deceased was in the regular prosecution of his business. He desired and expected to leave on that train. Finding that he would be left unless he got on while it was in motion, it was natural enough for him to make the attempt. The strong disinclination which people have to being left would impel him to do so. The railroad employees were getting on at about the same time. Imprudent though it is, it is a common practice for others to get on and off in the same manner. He had undoubtedly seen it done, if he had not done it himself, many times without injury. I cannot regard it, therefore, as a wilful and wanton exposure of himself to unnecessary danger, within the meaning of the policy."[1]

In another case where the policy provided that the insurance should only cover injuries "while actually traveling in a public conveyance provided by common carriers for the transporting of passengers, and in compliance with all rules and regulations of such carriers, and not neglecting to use due diligence for self-protection," and the insured was killed while attempting to get upon the cars at an intermediate station after they were in motion, the court say:[2] "It was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed. * * If a person having a right to leave a train at a station, is informed or notified in any way that the train is going to start, and an opportunity given to him to take his place again upon the train, and he chooses to remain until the train is put in motion, and then is injured in getting on the train, it may be said that he is negligent; in other words, that he takes the risk of getting on the train while thus in motion. But if, having alighted at a station,

[1] This case is approved in Prov. L. Ins. & Inv. Co. v. Martin, 32 Md. 310.

[2] Tooley v. Railway Pass. Ass. Co. 3 Biss. 399; s. c. 2 Ins. Law Jour. 275.

he has no notice by bell, whistle or otherwise, of the movement of the train, or he has not the opportunity, after notice is given, to get on the train, and intending to go further he attempts to get on the train and is injured, we think there is not the same measure of responsibility upon him. It would be natural for a man—for a prudent man—intending to go further on the train, to make an effort, even when the train was in motion, to regain his place on the train. * *. One of the conditions of these policies is, as has been stated, that Tooley should comply with all the rules and regulations of the common carriers. We are not prepared to say that it was incumbent on him, under the circumstances of the case, to make himself acquainted with all the rules which might be contained upon the time card. We must give this clause of the policy a reasonable construction. A policy is issued, we suppose, to any applicant. It is what is called an accident policy, and we are to infer that the meaning of this clause was that the traveler should only make himself acquainted with those general rules as to the management of trains and the conduct of railroads, which are presumed to be known to travelers under these circumstances. For instance, Tooley, as far as we know, was a stranger on this road. We cannot say that when he went on the train he was obliged, because of this clause in the policy, to examine the time card and ascertain all the minutiæ connected with the management and running of trains, but only such rules as a general traveler might be presumed and ought to know. Any other construction than this would operate as a snare upon travelers. But perhaps if he did not know the time the train stopped at a particular place, there might be a question whether it was not his duty to make some inquiries of the employees on the train."

In an unpublished New York case[1] it appeared that the policy provided that if the assured was guilty of a violation

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[1] Pratt v. Trav. Ins. Co. 7 Am. Law Rev. 595.

of any rule of any company or corporation, it should be void; and no recovery could be had in case of wilful exposure or want of due care. The deceased was passing over a platform between two cars, as the plaintiffs contended, or as the company contended, was standing smoking on the rear platform of the last car, when he fell off and was killed. The court charged the jury that if he fell from the cars while standing there when the train was in motion, and by carelessness on his part, and such carelessness was in violation of the policy, then the plaintiff could not recover. If he was standing on either platform smoking, or standing there for any purpose whatever, and not passing directly from one car to another, he was in an improper place, in violation of the rules of the railroad company, and guilty of such negligence as would prevent recovery. If he was not standing on the platform, but was passing from one car to another, the last car being the ladies' car, where no smoking was permitted, and was smoking previous to going upon the cars, and was passing from the ladies' car into the next car forward—the smoking car,—for the purpose of smoking, then it was for the jury to say whether he was careless or in due care, when in the darkness he was passing from one car to another, situated as these cars were. It was incumbent on the defendants to prove the deceased guilty of negligence. They set up the defense and were required to prove it.

In another case it appeared[1] that the insured was walking on a railroad track. A signal was given from an approaching engine at quite a distance from him. He first stepped off the track on the side, and then, when the engine was within fifty or a hundred feet, he deliberately went on the track again; and before he got across it he was struck and killed. A motion was made for nonsuit on the ground that the plaintiff had not established any cause of action. The court say: "That was a most reckless act. The rule is

[1] Hoffman v. Trav. Ins. Co. N. Y. Supreme Court, 7 Am. Law Rev. 594.

well settled that a party cannot walk on a railroad track without being guilty of negligence, and the courts hold that one about to cross the track must look both ways before attempting to cross, and that, if he omits to do that, he is guilty of negligence. So that it seems to me there is not a possibility of recovering under the proofs in the case. The circumstances show that there was gross negligence on the part of the deceased—more so than appears in any case I have had occasion to examine,—and as gross negligence as if the man had hanged himself. The very first condition of the policy is that the party insured is required to use all due diligence for personal safety and protection. Now is there a human being that will say that the deceased did use due diligence for his protection? The deceased was where he had no business to be."

In Stone v. United States Casualty Co.[1] the insured was required to use all diligence for personal safety and protection. He mounted to the second story of a barn he was building in order to view the work, and having stepped on a joist which had a concealed defect, it broke under him and he was killed by falling to the ground. At the time of the accident he had on two overcoats and was said to be an awkward man. The court held that it was wholly a question for the jury to decide whether he was exercising due diligence, and that whether he exercised such care as a prudent man should, was properly left to them to find. They add that there was no rashness or exposure in placing himself where he did, and that the breaking of the beam was pure accident.

§ 402. In an unreported case in the Supreme Court of the United States,[2] one of the conditions was, that the insurance shall "not extend to death or injury caused by dueling or fighting, or other breach of the law, on the part of the insured, * * or by his wilfully exposing himself to any unnecessary danger or peril." The defendant's husband was

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[1] 34 N. J. 371.

[2] Travelers' Ins. Co. v. Seaver.

killed suddenly, immediately after jumping from a sulky, in which he was driving in a match race, on the event of which a considerable sum of money was wagered. The defense of the company was, that his death was caused by a breach of the law and by his wilfully exposing himself to unnecessary danger.

The statutes of the State made all such racing for any bet or wager a misdemeanor. The court below instructed the jury, that if they should find that Seaver was killed by the race itself, by an ordinary accident of the race, so that the race was the proximate cause of the death, the plaintiff could not recover; but if they should find that Gilmore turned his horse in intentionally and tortiously, with the purpose of winning the race at all hazards, whether he should crowd Seaver from the track or not, then that the conduct of Gilmore, and not the race, would be the proximate cause of the death, and the plaintiff would be entitled to recover. That the plaintiff's evidence showed that Gilmore's turning in as he did was in violation of the rules of the race; that a man was usually to be taken as intending the natural and necessary consequences of his own acts. The Supreme Court say: "It would have been much nearer sound principles to have said to the jury that if Seaver saw that Gilmore was ahead of him ever so little, his persistence in so running his horse as to bring about a collision, was wilfully exposing himself to danger within the meaning of the policy. But we are of opinion that if the testimony raised the point, the instruction was erroneous. The company in protecting themselves against accident or death caused by a violation of law acted upon a wise and prudent estimate of the dangers to the person generally connected with such violations. * * It was against this general species of danger, attending nearly all infractions of the law, that the company sought to protect itself by the clause of the policy in question, and of this class was the reckless driving of Gilmore. If his intentions were as bad as the instructions imply, they did not take the case out of the protection of the clause. If Seaver had died the

moment he was thrown from the sulky, his death would have been caused by a violation of the law, though Gilmore may have disregarded the rules of the course, and may have intentionally sought to run Seaver off the track."

The jury found specially, "that when the sulky of Seaver came into collision with the sulky of Gilmore, Seaver jumped to the ground, and was entirely clear from the sulky, harness, and reins, upright and uninjured, and spoke to his horse to stop, and then started forward to get hold of the lines to stop him, and in that attempt was killed." The Supreme Court say: "It is said that this verdict is conclusive, that the death of the deceased was not caused by the violation of the law in trotting for a wager, but by his own voluntary act when he was not trotting. * * The leap from the sulky and securing the reins, and the subsequent fall and injury to Seaver are so close and immediate in their relation to his racing, and all so manifestly part of one continuous transaction, that we cannot, as this finding presents it, say there was a new and controlling influence to which the disaster should be attributed. If he had been landed safely from his sulky, and, after being assured of his position, had, with full knowledge of what he was doing, gone to catch the animal, his death in that pursuit, when the race was lost, might have been too remote to bring the case within the exception. But, as the finding presents it, we cannot say that the accident was not caused by the race, which was itself a violation of the law, and which might still have gone on had he caught his mare in time."

The jury were also instructed that it was also further to be considered how ordinary people in the part of the country where the insured resided, in view of the state of things then existing, the frequency of such races, and the way in which such matches are usually regulated, would naturally understand the language of the policy, whether as precluding such driving or not. As to this instruction the Supreme Court say: "We are of opinion that the language of this policy is to be construed by the court, so far as it involved matters of law,

and by the jury, aided by the court when it involved law and fact, and that in neither view of it was the opinion of ordinary people, in view of the state of things where the deceased resided, or their understanding of its language, in view of the circumstances of the case, any sound criterion by which the judgment of the jury should be formed, and the instruction in this branch of the case was unwarranted and misleading. The jury should have been left to decide for themselves, under all the facts before them attending the death of the insured, whether it was caused by his wilful exposure to an unnecessary danger or peril. Such light as the court, as a matter of law could give them, on the subject of the wilfulness of his conduct, or the presence or absence of any necessity, or the character of the necessity which would justify him, might be proper, but this general reference to what ordinary people in a particular locality might think about it, was clearly not so."

§ 403. **What is Being Disabled from Usual Employment.**— As to the nature of the injury it has been held,[1] that, where the policy provided that the company should be liable if the accident "shall cause any bodily injury" to the insured, of "so serious a nature as wholly to disable him from following his usual business," and the insured, a solicitor and registrar of a County Court, sprained his ankle, whereby he was confined to his bedroom for some weeks, and was unable to pass his accounts as registrar, or to attend at various places to complete purchases for clients, inasmuch as he was so disabled as to be incapable of following his usual occupation, though he was at no time confined to his bed, and could read and give directions to his clerks, he was wholly disabled within the meaning of the policy, which meant disabled from following his usual business in the usual way. In Sawyer v. United States Casualty Co.,[2] the policy provided that "If the said assured shall sustain any personal injury

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[1] Hooper v. Accidental Death Ins. Co. 5 H. & N. 546.

[2] Superior Court of Mass. 8 Law Reg. N. S. 233.

which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of his usual employment, then, on satisfactory proof of such injury, compensation shall be paid him * * so long as he shall be totally disabled as aforesaid in consequence of such injury; provided, however, that, for any single accident, such compensation shall not be extended over a period exceeding twenty-six weeks." The plaintiff claimed compensation for the full period, and the defendants denied his right to recover at all. The plaintiff, who was a farmer, was in his barn unloading his wagon of corn in the stalk, and hanging the corn upon the beams. He was standing about fourteen feet from the floor upon a plank, which rested on the rounds of two ladders leaning against the hay piled in bays on each side of the barn floor. While reaching up to arrange the corn, one of the ladders slipped on the hay, and the plaintiff fell to the barn floor, striking his back against the corner of the wagon. The court charged the jury that, if the plaintiff had met with such an accident as is described in the policy, he was entitled to recover for such time as he was rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent: "When you find, on an examination of the evidence, that the plaintiff was able to do substantially all kinds of his accustomed work, though with less facility and to a less extent than before his injury, then his right to recover ceases. The mere fact that a man cannot do a whole day's work, or that by a day's work he cannot accomplish so much as before the accident, is not sufficient to entitle him to recover; but he must satisfy you that for a time, by reason of his accident, he is deprived of the power to do to any extent substantially all the kinds of labor which constitute his usual employments. For such time he can recover, and no longer. For instance, if a farmer accustomed to perform all the kinds of labor usually done by farmers, should meet with such an accident, and the result should be that he was left able only to milk his cows, but unable to do the

other usual farm work, while that state of things continued he would be entitled to recover. So in case of a merchant; if his accident confined him to his house, although he might thus be able to make out his bills or post his books, yet if he were unable to do the other work ordinarily done by merchants of his class, and such work as he was accustomed before to do, for such time he would be entitled to recover. The phrase *substantially* all kinds of labor has been used in these instructions. By that, such a case as this is intended to be covered: If you find that at a certain time the plaintiff was able to do all such work to some extent as he ordinarily was accustomed to do, then his right to recover ceases, although you may find he was still unable to perform some kinds of extraordinary labor which before the accident he sometimes did. Thus, suppose a man occasionally did such a piece of work as digging a well, or laying a stone wall, this not being his usual business: when you find that he could to some extent do all the usual work to which he was accustomed, his right to recover ceases, although you may find him unable to dig a well or lay a wall."[1]

§ 404. **Injury from Outward and Visible Means—Drowning.**—In one case the policy provided that if the assured sustained any injury by accident or violence, and should die from its effects within three months, the company should be liable, but that no claim should be made in respect of any injury unless caused by some outward and visible means, of which satisfactory proof could be furnished.[2] It was held by the Exchequer Chamber,[3] reversing the decision below,[4]

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[1] Rhodes v. Passenger Ins. Co. 5 Lans. 71. In Potter v. Accident Ins. Co. 29 Ind. 211, there was an attempt to set aside a verdict for the defendant on an accident policy, which provided for compensation in case of an accident "not fatal, but which absolutely and totally disabled him from prosecuting his usual employment," there having been a conflict of testimony as to the extent of the injury.

[2] Martin v. Travelers' Ins. Co. 1 F. & F. 505.

[3] Trow v. Railway Pass. Ass. Co. 6 H. & N. 839; s. c. 7 Jur. N. S. 878; 9 W. R. 671; 4 L. T. N. S. 833; 30 L. J. Exch. 317.

[4] 5 H. & N. 211; s. c. 29 L. J. Exch. 218; 8 W. R. 191. The decision below rested on the ground that there was no evidence that he did not die from natural causes.

that drowning was an accident within the meaning of the policy, and that it was a question for the jury to decide whether he died from the action of the water or from natural causes.

In the course of the argument on appeal, Crompton, J., said: "If his death was caused by cramp, preventing him from swimming, then he died from injury caused by accident, but death by apoplexy is a death from natural disease." In giving the decision, Cockburn, C. J., said: "It is said that, assuming the deceased died by drowning, drowning is not one of the cases comprehended in this policy of assurance. Mr. Lush ingeniously argued that the policy only applies to cases where, from accident or violence, some injury occurs, from which death may or may not ensue, and if it ensues within three months the sum assured is payable. But he contended, in effect, that where the cause of death produces immediate death without the intervention of any external injury, the policy does not apply; and, whereas from the action of the water there is no external injury, death by the action of the water is not within the meaning of this policy. That argument, if carried to its extreme length, would apply to every case where death was immediate. If a man fell from the top of a house, or overboard from a ship, and was killed; or if a man was suffocated by the smoke of a house on fire, such cases would be excluded from the policy, and the effect would be that policies of this kind in many cases where death resulted from accident, would afford no protection whatever to the assured. We ought not to give to those policies a construction which will defeat the protection of the assured in a large class of cases. We are, therefore, of opinion that, if there was evidence for the jury that the deceased died by drowning, that was a death by accident within the terms of this policy. The next question is whether there was evidence for the jury that the assured met with his death by drowning. It appears that he went to Brighton for recreation, and there is no reason to suppose that he intended to commit suicide. He left his lodgings

for the purpose of bathing and his clothes were found by the water side, but he himself was not afterwards seen. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves. There was some evidence that this was the body of the assured, and assuming that it was, the question ought to have been submitted to the jury whether he met with his death by drowning. If they found that he died in the water they might reasonably presume that he died from drowning. It is true that death occurs in the water in some instances from natural causes, as apoplexy or cramp in the heart, but such cases are rare and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water, or natural causes. If they are of opinion that he died from the action of the water causing asphyxia, that is a death from external violence within the meaning of this policy—whether he swam to a distance and had not strength enough to regain the shore, or on going into the water got out of his depth."[1]

In Reynolds v. The Accidental Insurance Co.[2] the policy provided that the company was not to be liable "in respect of death or injury by accident or violence unless such death or injury shall be occasioned by some external and material cause operating upon the person of the said insured." The insured went into the sea to bathe, and while in a pool about one foot deep became suddenly insensible from some unexplained internal cause, and fell into the water with his face downwards; when found, water escaped from his lungs in such a manner as to prove that he had breathed after falling into the water. It was held that this was a death

[1] Martin, B., says in this case that "where death takes place in such manner that it may have happened from natural causes, the assurers are not liable;" the state of facts being consistent with one view or the other, there is no evidence for the jury.

[2] 22 L. T. N. S. 820; s. c. 18 W. R. 1141.

by accident within the policy, for though the immediate cause of death was suffocation by water, such suffocation would not have taken place had he not been incapable of helping himself in consequence of the insensibility. If a wound causes the insured to fall into the water and be drowned, the death is accidental.[1]

§ 405. **The Injury must be Caused by and directly Connected with the Accident.**—Where a person insured against accidents, under a parol contract for a single day, sprained his knee on that day, but continued at his labor for sixteen days, during which time he wrenched his knee and was rendered incapable to labor for more than a year subsequent to the expiration of the sixteen days, it was held[2] that, though if it had appeared from the nature of the first injury, that the assured would at some time have become incapable of labor from it, it might be that the happening of the second injury would not deprive him of his right to recover damages, yet as it appeared that he was able to work for sixteen days after the first injury, and, before he became incapable, another and additional injury was sustained, it was impossible to hold that he ever became totally incapable from the injury insured against, and he could not, therefore, recover. In Harris v. Travelers' Insurance Co., the deceased was a fireman, who was accidentally injured under a falling wall, but was rescued without apparent injury, continued his work for three months, and then took poison. It was claimed that the accident rendered him insane, but the court held[3] that, even though the insanity might have resulted from the accident, yet the death was too remote to be covered by the policy, which included only proximate results, while if he was sane his act was suicide.

In one case,[4] a policy against accidental death or injury

[1] Mallory v. Trav. Ins. Co. 47 N. Y. 52.

[2] Rhodes v. Railway Pass. Ins. Co. 5 Lans. 71.

[3] Superior Ct. of Chicago, cited 7 Am. Law Rev. 589.

[4] Fitton v. Accidental Death Ins. Co. 17 C. B. N. S. 122; s c. 34 L. J. C. P. 28. Williams, J., says: "It is to my mind merely a question whether the proviso at the end of

provided that it should be construed to insure against cuts, stabs, concussions, &c., when accidentally occurring from material and external causes, when such accidental injury was the direct and sole cause of death to the insured, or disability to follow his avocations; "but it does not insure against death or disability arising from rheumatism, gout, hernia, or other disease or cause arising within the system of the insured before or at the time or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury." It was held that death from hernia caused solely and directly by external violence, followed by a surgical operation, performed for the purpose of relieving the patient, was not within the exception, and was covered by the policy. In another English case,[1] the policy against death from accidental injury contained the following condition: "This policy insures against all forms of cuts, * * when accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured or disability to follow his avocations; but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured, before or at the time of or following such accidental injury (whether causing such death directly or jointly with such accidental injury)." The assured accidentally cut his foot against the broken side of an earthenware pan on Saturday, and on the Thursday following erysipelas supervened, of which disease he died on Saturday. The erysipelas was caused by the wound, and but for the wound he

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the first condition, that the company does not insure against death or disability arising from hernia, means hernia generally, whether arising from external violence or arising within the system, or whether 'hernia' is governed by the other words, 'or any other disease or cause arising within the system of the insured before or at the time or following such accident or injury.' * * I am of opinion that it means to exempt the company from liability only when the hernia arises within the system."

[1] Smith v. Accident Ins. Co. 5 L. R. Exch. 302; s. c. 39 L. J. Ex. 211; 22 L. T. N. S. 861.

would not have suffered from it. It was held that the insurers were protected by the condition, and were not liable. Cleasby, B., says: "Of the general object of the condition there can be, I think, but little doubt. When an accident happens to any one, causing bodily injury, a variety of diseases may supervene, as to which it may be difficult to say whether death is caused by the disease or by the injury sustained. To prevent the necessity of inquiry, this stipulation has been inserted to protect the company from liability in the case of certain supervening disorders. The policy first provides for the accidents it is to cover—and these it enumerates—and then follows the proviso that the company do not insure against death from 'rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before or at the time or following such accidental injury, whether causing such death directly or jointly with such accidental injury.' Now, these words are somewhat difficult to construe properly, but the true construction seems to me to carry into effect what I conceive to be the object of the condition. Take the case of gout. That is a disorder connected with the constitution. It might in any case be caused or not by an accident, but very often it would be very difficult to say whether it was or was not so caused; and I think this proviso was intended to meet this difficulty. The same remark applies to erysipelas and to hernia also, for that too is, or may be, to a certain extent, constitutional. All these cases are provided for, and when they or any of them, as secondary causes, occasion death, the policy is not applicable. It is unnecessary to deal with cases where death has been caused by diseases not enumerated among the secondary causes, such as paralysis resulting from the accident. I found my decision on the disease of erysipelas being excepted in express words, and on its being in this case a secondary cause of death. With regard to the case cited,[1] it presents no difficulty to my mind. The condition there did not contain any reference to second-

[1] Fitton v. Accidental Death Ins. Co., *ante*.

ary 'causes;' and, moreover, the hernia which occasioned the death of the assured was instantaneously caused by the injury. It was, in fact, the immediate result of the injury sustained."[1]

§ 406. **Death not a Defense to Claim for Weekly Allowance.**— The case of Perry v. Provident Life Insurance & Investment Co., already referred to in treating of the duration of the risk,[2] came subsequently before the Supreme Court of Massachusetts.[3] The policy insured the deceased against loss of life or personal injury; against loss of life if he "sustained personal injury caused by any accident within the meaning of this policy and the conditions hereto annexed, and such injuries shall occasion death within ninety days from the happening thereof," against personal injury, in the sum of $10 per week, for a period not exceeding altogether twenty-six weeks for any single accident "by which the assured shall sustain any personal injury which shall not be fatal, but which shall absolutely and totally disable him from the prosecution of his usual employment." The action was brought to recover the stipulated sum for each of thirteen weeks during which the testator was absolutely and totally disabled from the prosecution of his usual employment. The plaintiff's testator had his arm crushed by an accident on December 11, 1866, and continued to be absolutely and totally disabled from the prosecution of his usual employment till March 12, 1867, on which day he died from the re-

[1] See *ante*, § 402.

[2] 99 Mass. 162; *ante*, § 201.

[3] 103 Mass. 242. At the Summer Assizes at Lewes, in July, 1871, the case of Cross v. Railway Accident Assurance Company, was tried before Baron Bramwell. It appeared that deceased had effected a policy against all kinds of accidents, by the terms of which a gross sum was to be paid in case of death within three months of the accident, or a certain sum per week for twenty-six weeks in the event of disability caused by accident. The question in dispute was, whether she died from an accident or from Bright's disease, and there was a great conflict of evidence. The judge left the case to the jury, suggesting one practical test; was the woman in a good state of health to all appearance just before the accident, and did the symptoms come on immediately afterwards? If so, then it was difficult to avoid the inference that the accident had something to do with it. The company having admitted a liability for the weekly stipend for ten weeks, the jury found that that covered all the damages.

sults of the accident. The defendants admitted that the plaintiff was entitled to recover unless the fact that the accident was fatal constituted a defense, and the court held that the two provisions were to be construed together, that the evident intent was, that if any injury happened within the meaning of the policy it was insured against as coming within one class or the other; and, that if it were otherwise construed, an injury which should not prove fatal within ninety days, would furnish no ground of action till it should be made to appear that it would never prove fatal, which would be to render the insurance nugatory in such cases.

§ 407. **When Liability for Injuries in Traveling Exists.**— With reference to the time of the accident several cases have arisen. In Theobald v. Railway Passengers' Assurance Society,[1] the assured was to be paid a certain sum in the event of death happening from a railway accident whilst traveling on any line of railway, or a proportionate part in the event of his sustaining any personal injury by reason of such accident. The insured was traveling in a railway carriage to a certain place, and on the arrival of the train at that place, and after it had stopped, in stepping out of the car, without negligence on his part, he slipped off from the iron step and sustained an injury, and it was held that this was a railway accident within the meaning of the contract of insurance. Alderson, B., says: "As to railway accidents, my notion of a railway accident is, an accident occurring in the course of traveling by a railway, and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery connected with it." Pollock, C. B, said: "It is quite plain that the plaintiff was a traveler on the railway; it is quite plain that though at the time of the accident his journey had in one sense terminated by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still on it. The accident also happened without negligence on his part, and while doing an act

[1] 10 Exch. 45; s. c. 2 C. L. 1034; 23 L. J. Exch. 249; 26 Eng. L. & Eq. 432.

which as a passenger he must necessarily have done, for a passenger must get into the carriage and get out of it when the journey is at an end, and cannot be considered as disconnected with the carriage and railway and with the machinery of motion until the time he has, as it were, safely landed from the carriage and got upon the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such passenger."

The Supreme Court of New York arrived at a similar decision. They say:[1] "Was the plaintiff traveling when the accident happened? He was in the act of getting into a public conveyance for that purpose, and was injured while upon the outside step thereof. It would be a very strained construction of a contract like this to hold that he was not traveling. If he was not traveling it is difficult to say what he was doing. We think that as he was actually going from one place to another, he was traveling."

An accident policy[2] contained a proviso "that this insurance shall only extend to bodily injuries, fatal or non fatal, as aforesaid, when accidentally received by the insured while actually traveling in a public conveyance." The insured took the train at Chicago and proceeded to Kankakee. After stopping at the station several minutes and taking in water, the bell was rung; the conductor signaled with his light, and the train passed slowly to the coal-bin to take in coal, which was the practice, provided the entire train went beyond Kankakee. When the train stopped at the station, the insured with others left the cars, and when it started, he walked rapidly from the door of the station-house, where he was standing, going along the platform beside the train, and past the back platform of the rear car, until he reached the train, when he extended his hands to grasp the car rails, and slipping, fell in front of the rear car, which passed over him and he was killed. There was evidence that his journey ter-

[1] Champlin v. Railway Pass Ass. Co. 6 Lans. 71.

[2] Tooley v. Railway Pass. Ass. Co. 3 Biss. 399; s. c. 2 Ins. Law Jour. 275.

minated at Kankakee; that when the train was starting some one remarked that the bell was ringing, and that a person near the station-house called out to him as he was hurrying to the cars that the train was only going to coal up, and that he turned round as if he heard the call. The court say: "Tooley must have actually been a traveler in or upon the train; but it cannot be said that the responsibility ceased whenever he stepped out of the car to alight at a station, and that it never became operative again until his foot entered the car to resume his journey. That would be giving too narrow a meaning to the clause of the policy. We think that the fair construction of the liability assumed by the defendant in this respect was, that it included injuries received by Tooley while necessarily getting on or off the train as a traveler upon it. It is a question of fact, to be determined by the jury, was Tooley, at the time the injury was received by him, a traveler on the train? And this will depend upon the fact, whether his journey terminated at Kankakee. It is claimed on the part of the defense, that that was the termination of his journey; and if so, then he was not a traveler on this train at the time of the accident. * * According to the view which we take of the contract between the parties, if he were a passenger proceeding beyond Kankakee on the train, he had the right to leave the car at Kankakee and return to it; he was not bound, in other words, to remain inside of the car all the time."

§ 408. A question of the same nature was presented in another case in New York.[1] The insurance was against any "accident while traveling by public or private conveyances provided for transportation of passengers," and the accident occurred to the insured while she was going on foot over the customary route from a steamboat-landing to a railway station seventy rods distant, through the streets of a village, and she being at the time, in the prosecution of, and for the purpose of continuing by rail the journey, with reference to which the insurance was taken. The Court of

[1] Northrup v. Railway Pass. Ass. Co. 2 Lans. 166.

Appeals reversing the decision below say:[1] "It must be conceded that the injury received by the plaintiff's intestate does not come within the strict literal words of the contract of assurance. * * The intestate was not actually traveling upon any public or private conveyance provided for the transportation of passengers at the time of receiving the injury which caused her death. * * The policy must be construed so as to carry into effect the intention of the parties, so far as such intention can be determined from the language used, construed in the light of well-known extrinsic facts, which must be presumed to have been known to the contracting parties at the time of making the contract, and in reference to which it was entered into. One fact of this character, very important in the present case, is that of the frequent change required from one train of cars to another at intermediate stations upon the same journey. * * Can it be said that a passenger is not traveling within the meaning of this contract by public conveyance, while passing from one train to go on board another in the actual prosecution of his journey; or, for further illustration, can this be said of a passenger from New York to Dunkirk by the Erie, while going from the ferry-boat at Jersey City to get on board of the train at that place? I think that such passenger, within the meaning of this contract, and also within the fair construction of the language, is a traveler by public conveyance all the way from New York to Dunkirk, although he may walk a short distance from the ferry-boat to the train at Jersey City, or from one train to another, when such changes are made at intermediate stations. An injury received while so necessarily walking in the actual prosecution of the journey, is received while traveling by public conveyance within the meaning of the policy, as such walking is the actual and necessary accompaniment of such travel. There is no difference in principle between a passenger so walking and the intestate in the present case. * * It surely can make no difference in principle, that the space

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[1] 43 N. Y. 516.

to be walked over, in going from one conveyance to another, is a few steps more or less. Nor does it affect the question that the intestate might have procured a hack to carry her, had she so have chosen. She pursued the same course that the great majority of passengers did. This she had the right to do under the contract."

Of this case an able writer says:[1] "This construction of the contract is open to the objection that the principle laid down would apply equally to walking across the whole city of New York on a through trip to Washington, as well as to going from the ferry-boat at Jersey City to the train in the adjoining station. A traveler, therefore, in prosecuting his journey 'by public or private conveyance,' might find himself run over by an omnibus in Broadway, or hurt by a fire engine in the Bowery, or knocked down by a falling brick from a building, and yet hold the company liable for an injury which manifestly is excluded in contemplation of their contract, and not covered by their premium based on statistics of rail and steamboat casualties. * * No construction *contra proferentem*, should enlarge a contract of insurance by implication, so as to undermine its very foundation; and yet this is the effect of the decision of the Court of Appeals."

§ 409. **What is a Conveyance.**—In Ripley v. Railway Passengers' Assurance Co.,[2] the policy provided "that this insurance shall be payable only in the event of death or disability of the assured when caused by any accident while traveling by public or private conveyance." The deceased traveled by steamboat to Muskegon, and proceeded thence on foot towards his home, a distance of about eight miles. When about half the distance, he was met on the highway by two men who set upon him and waylaid him; he was rendered insensible and robbed, but revived, and reached his home in about two hours. He died from his injuries six

[1] 7 Am. Law Rev. 605.
[2] 2 Bigelow L. & Acc. Cas. 738, U. S. District Court, West. Dist. of Mich. Dec. 1870.

days afterwards. The case was tried before Withey, J., without a jury. One of the questions raised was whether he was traveling by private conveyance at the time he received his injuries. The court say: "When the term private conveyance is used, as in this policy, to indicate a mode of traveling, its ordinary popular acceptation means a vehicle or instrument of conveyance other and different from the person or thing to be conveyed. It will not answer any just rule of construction to hold that in one sense it is possi ble to say that a man walking on foot is a private conveyance for himself, and, therefore such must be its interpretation. The ordinary import of the language, and not the possible import, must control. My opinion is, therefore, wholly with the defendant on this question, and defeats a recovery by the plaintiff." This case was carried to the Supreme Court of the United States, and the decision below affirmed. Chase, C. J., in giving the opinion says:[1] "That the deceased was traveling, is clear enough, but was traveling on foot, traveling by public or private conveyance? The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or rather, what understanding must naturally have been derived from the language used? It seems to us that walking would not naturally be presented to the mind as a means of public or private conveyance. Public conveyance naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyance suggests a vehicle belonging to a private individual. If this was the sense in which the language was understood by the parties, the deceased was not, when injured, traveling within the terms of the policy. There is nothing to show that it was not."

Where an engineer, engaged in running railway trains, procured insurance against "any accident while traveling by public or private conveyance provided for the transportation of passengers," and the agent of the company knew his

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[1] 16 Wall. 336; s. c. 2 Ins. Law Jour. 538.

occupation, and the ticket was that known as "general accident," in contradistinction to the "travelers' risk," it was held that the company was liable where the insured was killed by an accident on the railroad. The court say:[1] "It is strongly contended that a locomotive or engine is not a conveyance provided for the transportation of passengers. This is certainly true, and if the ticket applies solely and exclusively to passengers or travelers, the position that the company is not liable cannot be controverted. A passenger would have no right to go upon an engine, and if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected. But this ticket was designed to include and cover something more than the ordinary risk incurred by the passenger or traveler. The locomotive is a necessary part of the conveyance. The ticket was a general accident as contradistinguished from a mere passenger or traveling ticket. The premium on one is double what it is on the other. When the ticket was sold it was known that Brown was an engineer, and the conclusion is unquestioned that he believed that he was insured while pursuing his employment or occupation. The company so thought, for it gave no instructions against insuring railroad employees till after the disastrous accident happened. * * As Brown was not insured as a passenger and traveler, but against all accidents, without regard to the capacity in which he was acting, the reasonable inference is that the ticket was intended to cover the risk and accident by which he met his death. If it be conceded that the meaning of the ticket is doubtful or ambiguous, still the question must be decided for the plaintiff, as the promisor would not fail to apprehend that the promisee labored under the impression that he was indemnified, and where such is the case, the construction must be most favorable to the insured."[2]

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[1] Brown v. Railway Pass. Ass. Co. 45 Mo. 221.

[2] As to this case, the writer already quoted (7 Am. Law Rev. 604), says: "The court, by an error manifest in the decision, treated this insurance as if procured under a 'general accident' ticket, which insured against all accidents." But is the engineer any less

§ 410. **Occupation of the Insured and its Change.**—In Provident Life Insurance Co. v. Fennell,[1] the claim was resisted because in the application the insured stated that his occupation was that of a switchman, but when he was killed he was acting as brakeman. The court say: "The representation was merely that the occupation of the deceased was then that of a switchman, the truth of which is not denied, and did not amount to a covenant that he would do no act not connected with such occupation, or that he would not engage in any different occupation. The policy was not against accidents occurring in the course of his occupation, but against accidents generally, and provided expressly in what particular cases the company was not to be liable, but did not provide that it would not be liable for death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation. If the company had desired to protect itself from all liability, except for accidents occurring in a particular occupation, it should have so expressly stipulated." Where the policy provided that it should be void if the assured changed his occupation to a more hazardous one, and he was a teacher, but when he fell from the frame of his house, was engaged in building two dwelling-houses, and the whole proof of change in business consisted in the fact of his causing these houses to be built, apparently for his own use, the court below declared[2] that fact to be no evidence whatever of the assumption of any new business by him, and left the point to the jury, with the instruction that "changing occupation" meant an engaging in another employment as a usual business. The court above said it was preposterous to affirm that because he, a teacher out of employment, had two houses built by contract, he thereby became a builder by profession.

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a traveler within the policy because he travels as a business? Was the court right in assuming that the locomotive was not a part of the conveyance?

[1] 49 Ill. 180.

[2] Stone v. U. S. Cas. Co. 34 N. J. 371.

But the company further insisted that, even if he did not change his business, he lost his life in doing an act not incident to his occupation of teacher, but incident to that of a builder. The court above considered that the instruction given to the jury was too favorable for the company, although the jury found for the plaintiff, and therefore the company had no exception. The instruction given to the jury was that the company is exempted from liability for injuries received in doing any act which falls peculiarly within the ordinary duty of any forbidden occupation, as if an attorney at law should take charge of a steam engine on a single occasion. But the appellate court held that the injuries excluded, which were described as "received in any employment, or by any exposure either more hazardous in itself," or so classified by the company, had reference to employments, and not to individual acts. Who can say what acts are properly incidental only to one occupation? The subdivisions of life are too numerous and diverse to admit of such sharp lines of distinction, and it would be improper by construction of any contract to import into it such confusion, especially where the restrictions against exposure afford protection to the company, and would cover the supposed case of an attorney's becoming an engine driver. Where the policy required that notice of any change in occupation or business should be given, it was held[1] that this did not require notice where on a single occasion the insured did some business not within the occupation stated in his policy.

§ 411. The American accident policies fix the amount to be paid, but in England, where there was apparently no fixed limit, it was held that the amount of damage could not be estimated by the proportion which the injury bore to the amount payable on the loss of life, and that the insured could recover for the expense and suffering occasioned by

[1] N. Am. L. & Acc. Ins. Co. v. Burroughs, 69 Penn. 43; s. c. 1 Ins. Law Jour. 84.

the injury, but could not recover anything for loss of time or profits;[1] the consequential mischief of losing some profit was not to be taken into consideration; otherwise, one passenger whose time or business was more valuable than that of another, would, for precisely the same personal injury, receive a greater remuneration than that other. What the insurance company calculate on indemnifying the party against is, the expense, and pain, and loss, immediately connected with the accident, and not remote consequences that may follow according to the business or profession of the passenger.

[1] Theobald v. Railway Pass. Ass. Soc. 10 Exch. 45; s. c. 2 Com. Law, 1034; 23 L. J. Exch. 249; 26 Eng. L. & Eq. 432.

CHAPTER XIV.

ARBITRATION, RECOVERY OF PREMIUMS, AND OTHER MISCELLANEOUS QUESTIONS.

§ 412. **Provisions for Reference to Arbitration.**—Sometimes, though less frequently than in fire insurance, a clause is inserted in the policy providing for some kind of reference or arbitration of claims under the policy. It is an ancient rule that any agreement made in a contract to refer all matters of dispute that may arise under it to the decision of persons named, or to be named, is void, as it "ousts the jurisdiction of the courts." Yet it seems to be settled that it is permissible to provide beforehand that isolated questions that may arise shall be so referred, and that the decision of such persons shall be a condition precedent to an action. Upon this principle stipulations requiring the certificates of architects or engineers before an action can be maintained are upheld,[1] as are stipulations referring particular questions to special persons or classes of persons.[2] And such agreement is good, though the referee so named is an officer of one of the parties.[3] It has been held by the House of Lords that the fact that the officer to whom it was agreed to refer the question, was also a stockholder in the company, and,

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[1] Smith v. Briggs, 3 Denio, 73; Wilson v. York & Md. L. R. R. Co. 11 G. & J. 58; Faunce v. Burke, 16 Penn. 469, 480; Monongahela Nav. Co. v. Fenlon, 4 W. & S. 205; Lauman v. Young, 31 Penn. 306; Snodgrass v. Gavit, 28 Penn. 221; Herrick v. Belknap, 27 Vt. 673; Fox v. Hempfield R. R. Co. 14 Leg. Int. 148; McMahon v. N. Y. & E. R. R. Co. 20 N. Y. 463; Glenn v. Leith, 1 C. L. 569; s. c. 22 Eng. Law & Eq. 489; Ranger v. Great West. R. R. Co. 5 H. of Ld.'s Cas. 72; s. c. 27 Eng. Law & Eq. 35.

[2] United States v. Robeson, 9 Peters, 319; Scott v. Avery, 5 H. of Ld.'s Cas. 811; s. c. 36 Eng. Law & Eq. 1; Tredwen v. Holman, 1 Hurlst. & Colt. 72; Braunstein v. Accidental Death Ins. Co. 1 B. & S. 782; Elliott v. Royal Ex. Ass. Soc. 2 L. R. Exch. 237; Horton v. Sayer, 4 Hurlst. & N. 643; Worsley v. Wood, 6 T. R. 710; Smith v. B. C. & M. R. R. Co. 36 N. H. 458.

[3] United States v. Robeson, 9 Peters, 319, and cases cited under two preceding notes.

therefore, directly interested in the result, did not render the agreement to refer invalid,[1] and such is believed to be the correct rule upon principle. It has, however, been held in one American case, that such a reference is invalid unless it is shown that the fact of such interest was made known before the reference.[2] In life insurance, such agreements to refer are likely to be confined to cases where a person named is to decide upon the cause of death, or whether representations were false, or is to adjust the amount to be paid.

In Campbell v. American Popular Life Insurance Co.,[3] it appeared that the defendants had at first refused to insure the plaintiff's husband because of his past intemperate habits, but they subsequently issued a policy, in which it was, among other things, provided that they would pay the sum insured on condition "that in the opinion of the surgeon-in-chief of this company, the party insured did not die of intemperance, with which disease the party is now, or is supposed to be, affected, nor by any disease produced or aggravated by said disease; but if it is decided by the surgeon-in chief that the party did die of said disease, or any other produced by said disease, then the company will only pay to the assured, and does agree to pay to the assured, within the above-mentioned time, an amount equal to all the premiums paid to the company by the assured, with compound interest thereon equal to the average of what the funds of the company have earned during the same time, as shall be stated by the treasurer, deducting from this amount only such sums as have actually been paid for the medical examination of the insured and for commissions on the premiums on this policy." The insured died a few months after the date of the policy, of apoplexy or congestion of the brain. It was admitted that shortly before his death he had, on one occasion, drank to excess, and there was a conflict of testimony as to whether he had not done so at other times, and whether

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[1] Ranger v. Great West. R. R. Co. 5 H. of Ld.'s Cas. 72; s. c. 27 Eng. Law & Eq. 35.
[2] Campbell v. Am. Pop. L. Ins. Co. Supreme Ct. of Dist. of Columbia, MSS.
[3] In Supreme Court of District of Columbia, 4 Law Times, U. S. R. 6.

his death was produced by intemperance or by excess in eating, accompanied with sedentary habits. The company on receiving the proofs of death investigated the facts, and procured the statement of various persons as to his habits and condition just prior to his decease. On submitting them, with the proofs, to the surgeon-in-chief of the company, he decided that the insured died of a disease produced or aggravated by intemperance. The company, thereupon, refused to pay the full amount insured, and an action was brought. The company claimed that the decision of the surgeon-in-chief was final, and, moreover, that as a condition precedent to a recovery, the plaintiff must prove that decision. On the trial the court charged the jury, in substance, that, even if an agreement to refer to arbitration was valid in any case, it was invalid where the arbitrator was one of the parties or an officer of one of the parties; and he left it to the jury to say whether, in fact, the insured did die of intemperance or a disease produced or aggravated thereby. The jury found for the plaintiff, but on appeal the verdict was set aside. After stating that the plaintiff did not produce the decision of the surgeon-in-chief, or show any excuse for not doing so, and that it was excluded when offered by the defendants, but that the record did not show the ground of the exclusion, the court continue: "If the offer was rejected because the surgeon's certificate was made or procured through fraud, or because he was interested in the cause, or for any other reasons supposed to be valid and sufficient to relieve the plaintiff from the performance of the condition in the contract on which she had sued, the facts ought to have been averred in the declaration, else they ought not to have been heard in objection to the evidence. * * But the question lay at the foundation of the plaintiff's own case, and was patent on the face of the contract and of the declaration. The declaration having itself set out the condition upon which the plaintiff could alone maintain an action, and containing no averment to excuse the plaintiff from procuring its performance, the plaintiff's difficulty was not removed by

the rejection of this evidence when offered by the defendant. On the contrary, her difficulties were thereby aggravated; for the defendant's offer having been rejected, and no bill of exceptions taken, the surgeon's certificate was not in evidence for the defense, and therefore subject to no objection on the part of the plaintiff, either as to its conclusiveness in form, or for any fraud, or interest of the referee, or of the company in making or procuring it; and the plaintiff was left with her case closed, and no evidence in on her part of the performance of the condition on which her right to maintain the action depended, nor any excuse either averred in her declaration or proved at the trial, for her omission to procure its performance. The cause of the plaintiff was therefore lost, upon her own showing, unless the condition in question was void in law, upon its face. But, if we do not misunderstand the instruction given to the jury, on this point, by the learned Chief Justice, he charged the jury that the condition was void in law. The following was his language: * * 'The reason why the court has postponed this issue, is because they have regarded in the current history of the case, and still regard, any undertaking between parties, that, in effect and substance, commits the judgments of the rights of two parties to the determination of one of them, to be void as against public policy. If the doctrine were to prevail that a man might bind himself by seal to commit his property, life and personal rights to the arbitrament of a party in contract with him, the effect would be to throw the weak into the hands of the strong; and it is to prevent this state of things that the law has declared, and does declare, that the forum of justice shall be the interpreter of the rights of parties. This is the reason why the court deemed it essential to justice, and in vindication of law, to pronounce the reference to the surgeon-in-chief, as a void reference in this undertaking, and to treat it as a blank.' If these doctrines be correct, then, parties themselves ought not to be allowed to settle their own controversies, for this, too, would oust the courts of their jurisdiction. For all that a party may do

himself, he can bind himself to do, if such should be the decision of his referee." After referring to various cases,[1] the court continue: "But, in our judgment, the decision of the King's Bench, in Worsley v. Wood,[2] a decision which has never, so far as we have been able to find, been called in question, either in this country or in England, is clearly in point, and decisive of the present case. The policy of insurance, in that case, contained a condition that 'persons insured shall give notice of the loss, forthwith deliver in an account, and procure a certificate of the minister, church-wardens, and some reputable householders of the parish, importing that they knew the character, &c., of the assured, and believed that he really sustained the loss, and without fraud;' and the court held that the procuring of such a certificate was a condition precedent to the right of the assured to recover; and that it was immaterial that the minister, &c., wrongfully refused to sign the certificate. * * It is worthy of note here, also, that the result in this case vindicated the course taken by the minister and churchwardens; for the claim was shown to be fraudulent. * That the mere fact of the referee being in the service of one of the parties, is no objection in law, to the validity of the condition, is a proposition too plain, we think, to require an argument. * * It is not to be denied that a mere agreement between parties, that any future differences growing out of their contract shall be decided by arbitrators, or referees, thereafter to be chosen, will not be allowed by the courts to oust their jurisdiction. But in this branch of the law there exist certain distinctions which, if carefully observed and followed, will, in our judgment, reconcile the authorities." After examining cases in detail, the court continue: "The effect of these decisions, therefore, is this, and nothing more, that an agreement to refer, which is so imperfect as not to be specifically

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[1] United States v. Robeson, 9 Peters, 319; Monongahela Nav. Co. v. Fenlon, 4 W. & S. 205; Ughtred's Case, 7 Coke, 9; Scott v. Avery, 8 Exch. 487; s. c. 20 Eng. Law & Eq. 327; 5 H. of Ld.'s Cas. 811; Brown v. Overbury, 34 Eng. Law & Eq. 610.

[2] 6 T. R. 710.

enforced in equity, and for breach of which nothing but nominal damages can be recovered at law, will not be allowed to oust the courts of jurisdiction, else there must be a failure of justice: or, in other words, courts will not permit their jurisdiction to be ousted, by an agreement which, from its defects, is impotent for that purpose; or, in a form still more succinct, the agreement shall not 'oust the court,' because it does not. But even so nugatory a contract as that is neither contrary to public policy, nor void, for an action may be maintained for its breach, although, for the reasons already stated, the plaintiff can recover only nominal damages. But if the contract be drawn in the 'prudential way,' recommended by Lord Eldon, by inserting a stipulation for liquidated damages, or, there be a separate bond to bind the parties, by penalty, to its performance, the contract must be fulfilled, or the penalty will be enforced. * * Nowhere have we been able to find any decision, or even dictum of a court, to sustain the doctrine announced by the court below, on the trial of this cause, that a contract binding the parties to a reference of their controversies, was contrary to public policy. On the contrary, the sole ground of the decisions on this subject is to be found, where from the lameness and inadequacy of such agreements, the parties have failed to provide any new tribunal of their own choice, to supplant the jurisdiction of the courts, or provide for a penalty or stipulated damages." The decision arrived at was doubtless correct, but the interpretation applied to prior cases is hardly correct. The pleadings in this case were subsequently amended so as to present the question, whether the fact that the interest of the officer by reason of being a stockholder was not disclosed, affected the validity of the agreement to refer, and it was held that it did.[1]

§ 413. **Discretion Reserved in Policy is not Controlled by Courts.**—If the policy reserves a right to the company to modify the contract, the courts cannot, in the absence of

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[1] Not reported. Decided, June, 1874.

fraud, interfere with their action. Thus where an extra premium was charged, but there was a right to a reëxamination, and it was agreed that if the society was "satisfied" that the cause for charging an extra premium had ceased, it should be thereafter reduced, it was held[1] on demurrer that the court could not interfere with a *bona fide* decision of the society declining to reduce the premium. Where a policy provided that in case of forfeiture the party interested should have the benefit of such equitable adjustment as might, from time to time, be provided by the directors, it was held[2] that this gave them exclusive power over the matter of adjustment, and that no court could interfere with it further than to prevent them from changing, to the injury of the assured, an established rule of adjustment existing at the time of the act or omission which worked the forfeiture.

In a case in Louisiana,[3] where the rules provided that, after a forfeiture, the association would, within a limited time, on the production of good reasons restore the policy, it was held that this provision must be strictly complied with, and a court could not assume to pass upon the sufficiency of such reasons not presented in time to the association.

§ 414. **Covenants to Pay Premiums.**—If a mortgagor of a policy neglects to pay the premiums, the mortgagee may do so, and recover the amount of the premium so paid with interest.[4] Where there was an express agreement that if the assignor of a life policy failed to pay the premiums, the assignee might do so and recover the amount, it was held that after payment of the premium the assignee had an undoubted right to recover it.[5] Where there is a right to charge against a fund the premiums paid on a policy, they cannot be charged unless the policy is actually effected, and if, therefore, the

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[1] Manby v. Gresham L. Ass. Soc. 29 Beav. 439; s. c. 31 L. J. Ch. 94.

[2] Nightingale v. State Mut. L. Ins. Co. 5 R. I. 38.

[3] Thompson v. Mut. Aid & Benev. L. Ass. Not reported.

[4] Hodgson v. Hodgson, 2 Keen, 704.

[5] Barber v. Butcher, 8 Ad. & El. N. S. 863; s. c. 10 Jur. 814; 15 L. J. Q. B. 289.

party, having a right to take the policy, elect to become his own insurer, no premium can be charged.[1]

Where a person gave to a third party a mortgage as security for a loan and also a policy of insurance, upon which he covenanted to pay the premiums to the company, but gave the third party authority to pay them if he did not, and to add the amount to the mortgage debt, it was held that the third party could recover only nominal damages against him if he failed to pay the premiums.[2] On the breach of a covenant to pay premiums the measure of damages is the real injury sustained through loss of the security or the expenses of a new policy, not the amount of the premium left unpaid.[3] Where policies of insurance were made the security of a debt, and the defendant covenanted to pay the premiums, but failed to do so, it was held[4] "that he was liable in damages, but not for the amount of the premiums he had failed to pay, but only for a nominal sum, because the policies were only a security, and it did not appear that any actual injury had been sustained. The court intimate that if the plaintiff had paid the premiums or procured another policy, there would have been ground for substantial damages. It has been more recently held that where there is a covenant to pay premiums, the damages are nominal, if payment is made before the policy lapses, but if it is allowed to lapse, the damages are the sum insured.[5]

Where a policy had been assigned to trustees for creditors, with a covenant to pay premiums, and not to do anything to forfeit it, and the insured violated a condition and so vitiated it, it was held[6] that he was liable to pay the

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[1] Grey v. Ellison, 1 Giff. 438; s. c. 25 L. J. Ch. 666; 2 Jur. N. S. 511.

[2] Brown v. Price, 4 C. B. N. S. 598; s. c. 4 Jur. N. S. 882; 27 L. J. C. P. 290.

[3] Nat. Ass. Ins. Co. v. Best, 2 H. & N. 605; Brown v. Price, 4 C. B. N. S. 598; s. c. 27 L. J. C. P. 290; 4 Jur. N. S. 882. And see Hawkins v. Coulthrust, 5 B. & S. 343; s. c. 12 W. R. 825; 10 Jur. N. S. 876; 33 L. J. Q. B. 192.

[4] National Ass. & Inv. Co. v. Best, 2 H. & N. 605.

[5] Solomon v. Isaacs, 27 L. T. N. S. 624.

[6] Hawkins v. Coulthrust, 5 B. & S. 343; s. c. 10 Jur. N. S. 876; 33 L. J. Q. B. 192; 12 W. R. 825.

value of the policy, to be assessed by an actuary, taking into consideration the covenant of the insured to pay premiums. Where a person covenanted to appear at any time at an insurance office and do what was necessary to enable another to insure his life, and that he would not thereafter do any act by which the insurance should be avoided, and he did so appear, but it was alleged that he subsequently did an act to forfeit the policy, it was held that the declaration must show that the defendant had notice that the policy was actually effected.[1] A covenant to do everything necessary to keep a policy alive is not violated by suicide. The covenant is affirmative, not negative.[2]

§ 415. **When Premium may be Recovered.**—Where the policy has been void *ab initio*, or in any case, "where a premium has been paid, but the risk has not been run, whether this has been owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned by the insurers;" "but if the risk has once commenced, there shall be no apportionment or return of the premium afterwards."[3] Thus where a policy had been granted with a foreign license, but not according to the proposal of the assured, and the court was of opinion that there never had been any complete contract, and that the policy must be canceled, it ordered at the same time the return of the premium paid to the office.[4] "Again, in an insurance upon a life," said Lord Mansfield, "with the common exception of suicide and the hands of justice, if the party is executed or commit suicide twenty-four hours after the completion of the policy, there shall be no return;" and the reason of this is, that the contract is for the entire risk, and a stipulation for the return of any portion of

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[1] Vyse v. Wakefield, 6 M. & W. 442; s. c. 8 D. P. C. 377, 912; 7 M. & W. 126.

[2] Dormay v. Borradaile, 10 Beav. 335; s. c. 5 M. G. & S. 380.

[3] Tyrie v. Fletcher, Cowp. 668, per Ld. Mansfield; Stevenson v. Snow, 3 Burr. 1237; Waters v. Allen, 5 Hill, 421; Clark v. Man. Ins. Co. 2 Woodb. & Min. 472; Anderson v. Thornton, 8 Exch. 425. But see Hoyt v. Gilman, 8 Mass. 336.

[4] Fowler v. Scottish Eq. L. Ins. Co. 28 L. J. Ch. 225; s. c. 5 Jur. N. S. 1169; *ante*, § 134.

the premiums is no term of it.[1] When, however, the contract is divisible, that portion of the premium which may have been paid for the risk not due shall be returned, as when, in addition to the renewal premium, a further premium is paid for a license to proceed to any foreign place, should the assured remain in England and never incur the risk, the premium must be returned.[2] An exception to this right to recover the premium, where no risk has been run, arises where there has been actual fraud on the part of the assured or his agent.[3] The same is true when the insurance is illegal, either as contrary to the statute, as, for example, where it has been effected without an insurable interest,[4] or for any other reason. Premiums paid after a forfeiture of a policy under such circumstances that there was by their receipt no waiver of the forfeiture may be recovered, as they were without consideration.[5]

§ 416. **When Money Paid on a Loss may be Recovered.**— Money paid by the company on a fraudulent policy[6] or paid erroneously or in ignorance that the policy had been forfeited,[7] may be recovered back, and it makes no difference that the company had in its possession the means of knowledge. If they paid in actual ignorance of the facts which gave a right to refuse payment, they may recover the money so paid.[8] But such mere ignorance is only an excuse so far as it relates to matters subsequent to the making of the contract, and where an action is brought to recover back money paid upon a policy alleged to have been obtained by

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[1] Bermon v. Woodbridge, Dougl. 789.

[2] Bunyon, 95.

[3] Chapman v. Fraser, 1 Park on Ins. 456; Prince of Wales Ass. Co. v. Palmer, 25 Beav. 605; Carter v. Boehm, 3 Burr. 1909; Friesmuth v. Agawam Mut. F. Ins. Co. 10 Cush. 587. The latter was a case of misrepresentation, and it was held to be well settled that no premium could be recovered.

[4] Bunyon, 95; Ellis on Ins. 153; Routh v. Thompson, 11 East, 428.

[5] Mitchell v. Mut. L. Ins. Co. of N. Y. Superior Court of Baltimore. Not reported.

[6] Court v. Martineaux, 3 Doug. 161; Lefevre v. Boyle, 3 B. & Ad. 877; Ellis on Ins. 163, 194.

[7] De Hahn v. Hartley, 1 T. R. 343; Elting v. Scott, 2 Johns. 157.

[8] Kelly v. Solari, 9 M. & W. 54; Kingston Bank v. Eltinge, 40 N. Y. 391; Union Nat. Bank v. Sixth Nat. Bank, 43 N. Y. 453.

fraud, it is not sufficient to prove that when the money was paid over the company was ignorant of some fact which if known would have enabled them to resist payment; they must go further, and prove actual fraud on the part of the party procuring the policy or his agent, which was not known to them at the time the payment was made, or with knowledge of which they were not then chargeable.[1] In the case just cited it was held[2] that even if it were clear that the assured had no knowledge of the fraud, it was sufficient to show that the policy was obtained by fraud for which the assured was chargeable either alone or in connection with others, and that if the agent of the assured was a party to the fraud, the assured was responsible, as the innocent principal cannot take an advantage resulting from the fraud of an agent without rendering himself responsible to the injured party. And it is sufficient if the false and fraudulent representations made to obtain the money are so far relied on, that but for them the payment would not have been made,[3] but if the payment was made with the knowledge that a defense was open to them, the company cannot recover it back.[4]

§ 417. **Action on Policy during Life of Insured.**—Where the insurers refused to receive a premium when due, it was held that the assured could treat the policy as at an end, and recover all the money paid under it for premiums; but as the court remark, this might be a very inadequate measure of damages.[5] And in a recent case the jury seem to have been allowed to assess the damages at a much larger sum.[6] It has been recently held[7] that an action may be maintained during the life of the insured, to have a policy declared in force, if the company wrongfully undertakes to declare it forfeited and refuses to recognize it as in force. The court

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[1] Nat. L. Ins. Co. v. Minch, 53 N.Y. 144; s. c. 2 Ins. Law Jour. 820; Mut. L. Ins. Co. v. Wager, 27 Barb. 354. [2] Nat. L. Ins. Co. v. Minch.

[3] Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221.

[4] Nat. L. Ins. Co. v. Jones, 1 N. Y. Supreme R. 466.

[5] McKee v. Phœnix Ins. Co. 28 Mo. 383.

[6] Smith v. Charter Oak L. Ins. Co. Central Law Jour. Feb. 12, 1874.

[7] Cohen v. Mut. L. Ins. Co. 50 N. Y. 610; s. c. 2 Ins. Law Jour. 426.

say that there is in such case an actual controversy, all the parties to which are before the court; that it being a mutual company, present rights under the policy, and incident to it, are denied the plaintiff, because "she is excluded from the privileges and denied the rights which belong to her as a member of the company. She is entitled, unless the claim of the defendant is well grounded, at once and at all times, to the privileges of other policy holders, and to be recognized as such. The plaintiff is entitled, if the right to pay the premiums and continue the policy still exists, to pay the arrearages and stop the accruing of interest, and to make the future payments as they accrue and become due, without interest, and relieve herself as well of the risk and burden of retaining the money which of right belongs to the defendant. The contract of insurance, where the policy is to be kept alive by periodical payments, is peculiar, and the duty to pay and the obligation to receive are mutual. It is somewhat different from a simple obligation to pay money, a tender to perform which would bar an action upon it. So, too, a receipt or acknowledgment of the payment is customarily given, and is as essential as evidence of the continuance of the contract as is the original policy. The policy holder is entitled to some evidence of the performance of the condition on his part, if, as is believed, the universal usage is for the insurers to certify in some way the fact that the annual premiums are paid. It is fit and proper that both parties to the contract should know their rights; especially is it important to the plaintiff and the insured, that if this policy is avoided they may seek insurance elsewhere, and if valid, that they may perform the conditions of the policy. In ordinary cases courts will not, in advance of any present duty, obligation or default, declare the rights and obligations of suitors; they will do it where peculiar circumstances render it necessary to the preservation of right." This decision was followed in the case of a policy issued by a stock company.[1]

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[1] Hayner v. Am. Pop. L. Ins. Co. 36 N. Y. Superior Court R. 211.

§ 418. **Actions upon Premium Notes.**—In Excelsior Life Insurance Co. v. Boelen,[1] a question was raised whether, after a policy had been allowed to expire by the non-payment of premiums, the company could recover upon notes given for a portion of the prior premiums, and it was held that they could.[2]

In Mutual Benefit Life Insurance Co. v. Jarvis,[3] it appeared that the charter provided that all who insured should be deemed members while they continued so insured; that the company might take the notes of the members, either in whole or part payment of premium; that if losses were sustained in excess of the funds on hand, the directors might assess the deficiency ratably upon such members, the assessment not to exceed the sum due on the notes, of which sixty days' notice was to be given; and if the amount assessed was not paid within that time, the party in default was to cease to be a member of the company, and forfeit all preceding payments. It was also provided that if the premium in any case should exceed fifty dollars, one fourth of the amount should be paid in cash, and the balance might be paid by a secured note, subject to assessment. The defendant effected insurance, paid one-quarter of the first year's premium in cash, and gave his note for the balance. At the expiration of the first year he paid one-quarter in cash towards the second year's premium, and gave his note for three-quarters of the total premium for the first and second years, and took up his former note. The insured at the end of the second year gave up his policy, and withdrew from the company. In an action on the last note, after the policy had lapsed, it was held, that in the absence of proof of any assessments to make up deficiencies as provided in the charter, the company were not entitled to recover; the note being regarded as a mere security for the payment of losses, upon assessments made for that purpose.

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[1] Not reported, N. Y. Marine Court.

[2] But see *contra*, Robert v. N. E. Mut. L. Ins. Co. 1 Disney, 355; s. c. 2 Disney, 106, *ante*, § 183.

[3] 22 Conn. 133.

§ 419. **Illegal Employment as Affecting the Policy.**— In the earliest American case upon life insurance, where the insured, without the knowledge of the assured, engaged in an illegal traffic, slave-trading, it was held that as nothing in the policy prohibited such engagement, it was not forfeited. The court say:[1] "Whatever the law may be as to an insurance upon an illicit voyage, between the parties to the contract, the present plaintiff being ignorant of any intended violation of the law, ought not to be affected by such illegality. Had the policy been effected for Jabez Lord himself, it might be questionable whether, as the underwriters had excepted no particular employment in which he might be engaged, and no cause of death but suicide and forfeiture of life for crime, whether his engagement in any traffic prohibited by law would have discharged their liability. If it would, it must be only because it might be thought just and legal to discourage contracts which might tend to uphold enterprises forbidden by the laws. It would be difficult, however, to maintain that the executors of a man, whose life was insured for the benefit of his children, should be deprived of their right to enforce the contract because he had pursued a course of smuggling or counterfeiting, neither of these acts being excepted in the policy, and the party having died within the time from a cause which was clearly at the risk of the underwriters. A policy made for the purpose of enabling a man to commit crimes would undoubtedly be void. But one honestly made would seem not to be affected by the moral conduct of the party who had procured it."

§ 420. **Removal of Actions to United States Courts.**—In Morton v. Mutual Life Insurance Co. of New York,[2] the defendants, a foreign insurance company doing business in the State of Massachusetts, had, in accordance with the law of that State, appointed an agent residing there upon whom process could be served. It was claimed that this prevented the company

[1] Lord v. Dall, 12 Mass. 115; see *ante*, §§ 218 to 220, 248, 249. [2] 105 Mass. 141.

from removing an action commenced by such service to the United States Circuit Court, under the provisions of the Judiciary Act of 1789,[1] which allows actions between citizens of different States to be so removed. The action was upon a policy of insurance issued by the defendants in Massachusetts upon the life of a citizen of that State. The court held that the action could nevertheless be so removed. They place their decision solely upon the language of the statute of Massachusetts, which, they hold, relates only to the mode of serving process, and contains no restriction upon the company after it comes into court.[2] A similar decision has been made in other States.[3]

In the Massachusetts case the court were careful to say that the question of the constitutional power to impose as a condition a waiver of the right to remove an action into the United States court does not arise. Since that opinion was delivered, however, the Supreme Court of the United States has decided that a State may impose terms upon a foreign corporation as a condition of being allowed to do business within its border.[4] The Legislature of Ohio has passed a law which requires foreign insurance companies doing business in that State to file with the superintendent of insurance "a written statement, duly signed and sealed, waiving all right to transfer or remove any cause then or thereafter pending in any of the courts of this State,

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[1] U. S. Stat. 1789, c. 20, § 12.

[2] The Massachusetts statute is as follows: "Every foreign insurance company, before doing business in this State, shall in writing appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served, with like effect as if the company existed in this State; and said writing or power of attorney shall stipulate and agree on the part of the company making the same, that any lawful process against said company, which is served on said general agent, shall be of the same legal force and validity as if served on said company." Gen. Stat. c. 58, § 68

[3] Hobbs v. Manhattan (F.) Ins. Co. 56 Me. 417; Knorr v. Home (F.) Ins. Co. 25 Wisc. 143; Dennistoun v. N. Y. & N. H. R.R. Co. 1 Hilt. 62; Fisk v. Chicago, R. I. & P. R. R. Co. 3 Abb. N. S. 453; Stevens v. Phœnix Ins. Co. 41 N. Y. 149, overruling s. c. 24 How. 517; Newhall v. Atlantic F. & M. Ins. Co. 1 Ins. Law Jour. 89; Holden v. Putnam (F.) Ins. Co. 46 N. Y. 1; *contra*, People *ex rel.* Glen's Falls Ins. Co. v. Judge &c. 21 Mich. 577.

[4] Paul v. Virginia, 8 Wall. 168; Liverpool Ins. Co. v. Mass. 10 Wall. 566; Ducot v. Chicago, *Ib.* 410.

wherein said company is or may be a party, to any of the courts of the United States." So far as this statute is sought to be applied to suits pending or contracts existing at the time of its passage, it is clearly unconstitutional, unless the company thereafter continues to do business in Ohio; in which case it may, perhaps, be held that it has in effect made a contract with the State, by which it has waived one of its constitutional rights as to all contracts, prior as well as future. But the position has been taken by the companies that the law is wholly unconstitutional. The courts of Ohio have, however, decided to the contrary, holding that a foreign corporation has no right to do business in the State, except upon such conditions as the State prescribes,[1] and that the State may discriminate in favor of its own corporations;[2] that the law is "not an enactment that the State courts shall have exclusive jurisdiction of all suits growing out of that business, for the defendants have the right, in a proper case, to go into the Federal courts for any cause of action arising here. Such an act would, if it went to that extent, be unconstitutional; for though corporations are not citizens for some purposes, such as the right of migration, &c., they are citizens within the judiciary acts for the purpose of enforcing contracts. * * The exercise of the right to remove a cause by the defendants, in the absence of any State legislation, is wholly optional. They may do it or not, just as they please. May they not waive the right by either not exercising it in time, or by their own positive act or agreement? Suppose the defendants should come into court in these actions, and in open court, on the record, waive the right of removal. Would it not be as competent for them to do so as to waive the right to service by process, or the right of appeal, or to take a proceeding in error, or the removal of a cause to another county, and would it not be as binding? And may they not do any of these by a contract? Or suppose they neglect to exercise

[1] Best v. N. Y. L. Ins. Co. 2 Cincin. 329, affirmed on appeal; 23 Ohio St. 105.
[2] See Lafayette Ins. Co. v. French, 18 How. 404; Paul v. Virginia, 8 Wall. 168.

any of these rights, are they not bound as other parties by their own default? It is true, as a contract, this waiver might not be good as between the parties, for no consideration can be said to have passed between them. But this act is a public act, and all persons, including the defendants, assent to the laws of the State, and they are binding on them; and the duty of making this waiver was created by law, and in this view derives its force wholly therefrom. 'A party is barred by the statute of limitations, not because he has so agreed, but because such is the positive law.' The positive law which gives the defendants the right to transact business here, also couples with it a condition which the State has the right to annex. And the defendants have entered into a solemn stipulation accordingly with the State, which is the representative of its citizens. And it applies to the remedy. It is the law of the place of the remedy, and the courts, as deriving their authority from the State, are bound to enforce it. Suppose the State authorities should, for good cause, revoke this license. It cannot be contended that they have not the right to do so. Or suppose that defendants had refused to execute and file these waivers. Can it be contended, under the authorities, that, in either case, the defendants could lawfully have transacted business in the State? The protest of one of the defendants amounts to nothing. The waiver was executed and filed, and it could test the question as well by not reserving the right in the instrument itself. How, then, stand these cases? The defendants have complied with the act, and filed their waiver. They have appeared in these causes and voluntarily admitted it, and stand by it. And we can see no good reason why they should not be bound by it in these causes, as in the case of any other waiver which they are competent to make in the causes. They now substantially say, we are doing business in Ohio, because we filed this waiver; we waive in these causes our right of removal, and ask the court to hold us to it, if the legislation authorizing the waivers is not unconstitutional. But, again, they have

not only made these waivers, but in fact ratify and confirm them, and have received, and are receiving, benefits under the act of the Legislature; and they ought to be estopped from denying its constitutionality, or questioning its propriety, or the propriety and force of their stipulation."[1]

§ 421. **Action by Insurer against Wrong-doer.**—Where a person insured was negligently killed by a railroad company, it was held that an insurance company, which had been compelled to pay an insurance on his life, could not maintain an action against the railroad company, both because there is at common law no liability *civiliter* for the destruction of human life, and because the insurance company sustained no relation to the authors of the injury.[2]

Where a party had received from an insurance company the amount of an insurance for the injury he had received by an accident, it was held that in a suit against the town for the damage sustained by the accident, on account of the unsafe condition of the highway, there was no technical ground which necessarily led to the conclusion that the money received by the plaintiff of the company should operate as a defense, or inure to the benefit of the defendant; the insurer and the defendant were not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter; nor was there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. If it be assumed that the plaintiff was entitled to

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[1] See Railway Co. v. Whitton, 13 Wall. 270. It is understood that the question of the constitutionality of this or a similar law is now pending before the Supreme Court of the United States.

[2] Conn. Mut. L. Ins. Co. v. N. Y. & N. H. R. R. Co. 25 Conn. 265. As to fire insurance see Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253; Monmouth Co. Mut. F. Ins. Co. v. Hutchinson, 6 Green. 107; Hart v. Western R. R Co. 13 Met. 99; Weber v. Mor. & Es. R. R. Co. 35 N. J. 409; Hall v. Nashville R. R. C . 13 Wall. 367; Peoria M. & F. Ins. Co. v. Frost, 37 Ill. 333; Mason v. Sainsbury, 3 Doug. 61; London Ass. Co. v. Sainsbury, 3 Doug. 245.

but one satisfaction for the injury he had sustained, the defendant stood in no condition to make that objection. As between the insurer and the defendant, the defendant ought primarily to make compensation to the plaintiff, and ultimately to bear the loss, and the payment by the insurer, and the collection of the entire damage of the defendant only created an equity between the plaintiff and the insurer, to be ultimately adjusted between them.[1]

§ 422. **Amount to be paid in Cases of Reinsurance. Interest.**— In a recent case one company insured a man for $15,000, and afterwards reinsured $10,000 of the risk in two other companies. A fourth company subsequently reinsured all the outstanding risks of the first company, after which the insured died. An arbitration then took place between the several companies, as the result of which it was decided that the fourth company was liable only for $5,000, the two original reinsuring companies being liable for $10,000, which they had after the loss paid to the first company. On this state of facts it was held that the fourth company was liable to the original assured for the full amount of $15,000, that the assured had accepted the agreement for reinsurance made by them and was not affected by the arbitration.[2]

The earlier English decisions were to the effect that no interest could be allowed in an action to recover a sum insured,[3] though it was also held that if there had been a distinct demand for a definite sum, interest could be recovered,[4] and a similar view was taken in some early American cases,[5] but it is now held that where the amount of the loss is a definite sum it bears interest.[6] As in life insurance the amount is always fixed by the policy, there can be no doubt

[1] Harding v. Town of Townshend, 43 Vt. 536; s. c. 1 Ins. Law Jour. 685.
[2] Glenn v. Hope Mut. L. Ins. Co. 1 N. Y. Supreme Ct. 463.
[3] Higgins v. Sergeant, 2 B. & C. 348.
[4] Bain v. Case, 3 C. & P. 496; s. c. Mood. & Malk. 262.
[5] Vandenheuvel v. United (M.) Ins. Co. 1 Johns. 406.
[6] McLaughlin v. Wash. Co. Mut. (F.) Ins. Co. 23 Wend. 525; Bridge v. Niagara (M.) Ins. Co. 1 Hall, 247, 261, note.

that interest is recoverable from the time when the loss becomes payable, and where the policy contained no provisions as to proofs of death or time of payment, it was held that interest would run from the expiration of a reasonable time after notice.[1]

§ 423. Where an executor, without special authority, applied the testator's assets, for several years, in insuring the life of a debtor to the estate, and then dropped the policy without consulting the parties beneficially interested, or applying to the court for directions, it was held that he was personally liable for the whole amount which would have been recovered if he had kept up the policy.[2]

In Rochester Insurance Co. v. Martin,[3] it appeared that a company formed to insure against fire and risks of navigation, issued a policy purporting to insure animals against death from disease or accident, and it was held that as the act was beyond their corporate power, they could not recover on a note given for the premium.

§ 424. Questions connected with the transfer of the business of a company have arisen very frequently in England, where the amalgamation of insurance companies is a matter of constant occurrence. The questions which arise are usually controlled by statutory provisions, and do not, therefore, necessarily furnish precedents in this country.[4] It may be noted, however, that it has been held in England that the ordinary power vested in the management of every life office does not authorize the wholesale purchase of a business.[5] In this country it has been held in New York,[6] that where a foreign insurance company has been adjudged insolvent, and a receiver of the funds in that State has been appointed, the court must approve the company in which its risks are to be

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[1] Tooley v. Railway Pass. Ass. Co. 3 Biss. 399; s. c. 2 Ins. Law Jour. 275.

[2] Garner v. Moore, 3 Drewry, 277; s. c. 24 L. J. Ch. 687. [3] 13 Minn. 59.

[4] As to these cases see Bunyon, 158, *et post;* also King v. Accumulative L. Fund & Gen. Ass. Co. 3 C. B. N. S. 151.

[5] Ernest v. Nicholls, 2 H. of Ld.'s Cas. 401.

[6] Mooney v. Brit. Com. L. Ins. Co. 9 Abb. N. S. 103.

reinsured, selecting the one which seems best for all, even though a considerable number of policy holders request that they may be re-insured in another company.

The assured is in cases of the transfer of the business of one company to another placed in a position of great difficulty. No loss having occurred, and the validity of his policy not being disputed, he has no present right of action against any one. He may doubtless refuse, in any way, to recognize the transfer of his contract to a new party, and continue to pay or tender the premiums as they fall due to the original company, if he can find any of its officers. If after due inquiry he is unable to find any such officer to receive the premium, its non-payment would be excused. But in the meantime, when a loss occurs, he will find that the entire assets of the company which insured him, have been transferred to and mingled with those of another company, and indeed this process of transfer may have been repeated several times, and he is left to the doubtful remedy of securing the application to his policy of such portion of the assets of the original company as he can show has not already been disposed of in payment of its debts. If, on the other hand, he pays the premiums thereafter accruing to the new company, he is in danger of being held in analogy with the decisions in England, under the "Winding-up Acts," to have assented to the transfer, and to having agreed to look thereafter solely to the new company, that is, to persons with whom he did not contract, and in whom it may be he has no confidence. The wrong is one which can only be remedied by legislation, and even that is difficult to devise.[1]

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[1] With reference to what constitutes an assent to the transfer, Lord Cairns decided in the "Albert Arbitration" (created under a special act of Parliament in consequence of the insolvency of the Albert Life Assurance Company, after swallowing up nineteen other companies), that, if a policy holder after receiving notice of an amalgamation paid his premium to the new company, he accepted the latter as his contractor, made what is called a novation of his contract, unless he showed expressly that the payments were made to them as agents of the original company. Kennedy's Case, Reilly's Report, 5; Dale's Case, *Ib.* 11; Whitehaven Bank Case, *Ib.* 62; Lancaster's Case, *Ib.* 95. Also

§ 425. **Bankruptcy of the Insurer.**—There seems to be no reported decision in this country as to the effect of the bank-

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that the same result followed if he not only paid the premium to the new company, but knowingly allowed a bonus or dividend declared by the new company to be added to the amount assured. Wernrick's Case, *Ib.* 101; Allen's Case, *Ib.* 127; Knox's Case, *Ib.* 182; Glazebrook's Case, *Ib.* 135. He, however, held that there was no novation where the assured protested in writing against the amalgamation, and gave notice that his future premiums would be paid only subject to and on the footing of the protest, and to prevent any question of lapse. Wood's Case, *Ib.* 54; Dooning's Case, *Ib.* 144. But he refused to allow a similar effect to a mere verbal protest against the amalgamation made to an agent—Rivaz's Case, *Ib.* 104; Holmes' Case, *Ib.* 110—or to the claim from the new company of the allowance of the same number of days of grace allowed by the original company, but which were in excess of those ordinarily allowed by the new company—Warne's Case, *Ib.* 113—or to a verbal protest followed after explanation by payment of premiums to the new company. Howell's Case, *Ib.* 116.

Lord Westbury, in the subsequent "European Arbitration," adopted a more stringent rule than Lord Cairns, and required stronger and distinctly affirmative proof of the intention of the assured to accept the new company. He held in substance that it must affirmatively appear that the new company had the corporate power to assume the contracts of the old company; that the fact of transfer was communicated to the assured, with an offer to him to accept either a new policy or an assumption of the old one, and that his acceptance of the offer must be proved by "acts which unequivocally denote his understanding and acceptance of that proposal;" that there must be evidence of an intention to make a new contract as plainly as if it were expressed in writing; that the mere act of payment of the premium to the new company is equivocal, and that taking a receipt from the new company proves nothing, and that in the absence of evidence of other acts those alone do not show a novation. Coghlan's Case, Reilly's Report, 46; Blundell's Case, *Ib.* 84. It is, however, stated in a recent number of the Solicitors' Journal, that Lord Romilly, having been appointed to succeed Lord Westbury on the latter's death, has returned to the views adopted by Lord Cairns. Parliament in 1872 by the Life Assurance Company's Act, on which Lord Westbury in a measure relied, though he admitted it did not control, provided that no act thereafter done should be held to be a novation, unless there was a writing to that effect.

The courts have held that where a person after notice of amalgamation paid his premium for years to the new company, and made a claim upon it, there was a novation. *Re* Nat. Prov. L. Ass. Soc. 9 Law Rep. Eq. Cas. 306; s. c. 22 L. T. N. S. 465; 23 L. T. N. S. 770. So where he paid premiums to and accepted a bonus from the new company. *Re* Times L. Ass. & Guar. Co. 5 Law Rep. Ch. Ap. 381; *Re* Anchor Ass. Co. *Ib.* 632. So where he also procured the new company to indorse his policy as "guaranteeing its due fulfilment." *Re* Internat. L. Ass. Soc. 9 Law Rep. Eq. Cas. 316; s. c. 39 L. J. Ch. 295; 22 L. T. N. S. 467. Where a person, being a policy holder in one company and a shareholder in another, assented as such shareholder to an amalgamation, it was held there was a novation. *Re* Nat. Prov. L. Ass. Soc. 6 Law Rep. Ch. Ap. 393; s. c. 22 L. T. N. S. 465. It has been held that there was no novation by merely taking receipts for premium in the name of the new company, with no proof that he knew of any amalgamation. *Re* Manch. & Lond. L. Ass. & Loan Ass. 5 Law Rep. Ch. Ap. 640. Nor where there was an express refusal to sign an assent to a transfer of liability, but premiums were subsequently paid to the new company. *Re* Med. Inv. & Gen. L. Ass. Soc. 6 Law Rep. Ch. Ap. 374. Nor where an annuitant refused to submit to the transfer, but received his annuity from the new company, an annuitant

ruptcy or insolvency of the company. It has been held[1] in England, under the "Winding-up Acts," that in case of the winding-up of the company the policy holder is entitled to prove for the sum which would be required by a solvent office, having the same rate of premium and the same extent of proprietary capital as the company in liquidation, to be paid in order to give the policy holder a policy of the same amount at the same premium; no difference to be made in the case of participating policies. But in the Albert Arbitration Lord Cairns dissented from this view,[2] holding that, if the only element of difference at the time of failure was the increased age of the insured, so that the premium could be easily estimated, the rule furnished a not inaccurate means of getting at the value of the policy, yet that the introduction of other elements made a difficulty. "Because the decision goes to this, that if the particular person whose life is proposed for reinsurance, has in the meantime passed into a state of health which either makes him non-insurable or makes him insurable only upon more disadvantageous terms than formerly, or if the life to be reinsured cannot be produced for re-examination, in all those cases the person is under some peculiar and special damage arising in his own case—a special and peculiar damage separate from the question of the value of his policy, and practically provision is to be made out of the assets of the company for that peculiar and special damage." He also suggests difficulties connected with the expense of a re-examination, with procuring a reliable opinion as to the proper premium, and adopts, instead of the rule in Bell's case, "what is termed and known as a pure premium valuation as at the date of the winding-up order, the rate of interest assumed being four per cent., and the tables being the Seventeen Offices Experience Tables.

being regarded as differently situated from a policy holder. *Re* India & Lond. L. Ass. Co. 7 Law Rep. Ch. Ap. 651; s. c. 20 W. R. 586, 790; *Re* Nat. Prov. L. Ass. Soc. 9 Law Rep. Eq. Cas. 306; *Re* Fam. Endow. Soc. 5 Law Rep. Ch. Ap. 118; s. c. 21 L. T. N. S. 775.

[1] Bell's Case, *Re* Albert L. Ass. Co. 9 L. R. Eq. Cas. 706; *Re* English Ass. Co. 14 L. R. Eq. Cas. 72.

[2] Quoted in note to case last cited. Also Reilly's Report of Albert Arbitration, 76.

The principle will be adopted in this way. There must be determined, on the one hand, the present value of the reversion in the sum assured at the decease of the life, and, on the other, the present value of the future annual premiums. The difference between these two sums represents the value of the policy. But the annual premium payable is divisible into two parts, first, the part which, it is calculated, will provide for the risk, called the pure premium, and secondly, the addition for office expenses and other charges, which is sometimes called the loading. The pure premium only is to be taken into account. The value of the policy therefore will be the difference between the value of the reversion in the sum insured and the value of a life annuity of an amount equal to the pure premium."

CHAPTER XVI.

MUTUAL INSURANCE COMPANIES.

§ 426. Reference has been necessarily made in the preceding chapters to the rules applicable to mutual companies. The laws of many of the States contain detailed regulations as to the powers and modes of procedure of mutual companies. It is not proposed to refer to them, nor to special arrangements under which the capital stock or a guaranty fund is sometimes made up by deposit notes;[1] but to state briefly some of the general principles applicable to such companies. As a general rule in deciding any question arising under a policy in a mutual company, it is necessary to look to the charter, to the by-laws, and to the policy to ascertain the entire contract and the rights and obligations of the company and the assured. Every person insured in a mutual company thereby becomes a member of the company, and is bound to know its rules, and is bound by them, though they are not recited in the policy.[2] It has been recently held,[3] however, that it is not to be understood by the use of the word "rules," that reference is made to the regulations adopted by the officers of the company in regard to the transaction of business, but rather such rules as enter into the constitution of the company, as provisions of its charter or its by-laws. Rules in the nature of instructions to officers or agents, di-

[1] Dana v. Munn, 38 Barb. 528; Savage v. Medbury, 19 N. Y. 32; Buckman v. Metcalf, 32 N. Y. 591; Hope Mut. L. Ins. Co. v. Weed, 28 Conn. 51; Hope Mut. L. Ins. Co. v. Perkins, 38 N. Y. 404; Mut. Ben. L. Ins. Co. v. Davis, 2 Kern. 569.

[2] Susquehanna (F.) Ins. Co. v. Perrine, 7 W. & S. 348; Mitchell v. Lycoming (F.) Ins. Co. 51 Penn. 402; Diehl v. Adams Co. Mut. (F.) Ins. Co. 58 Penn. 443; Coles v. Iowa State Mut. (F.) Ins. Co. 18 Iowa, 425; Woodfin v. Asheville Mut. (F.) Ins. Co. 6 Jones' Law, 558; Walsh v. Ætna L. Ins. Co. 30 Iowa, 133.

[3] Walsh v. Ætna L. Ins. Co. 30 Iowa, 133.

recting the discharge of their duties, &c., cannot be meant, but rather the rules whereby the liability and right of members of the company are fixed, which are parts of the laws of the institution. If the rules are changed after the insurance is obtained, they cannot, without the express consent of the assured, be held to vary the terms of the contract he has entered into. The company has no right to impose new conditions affecting his rights under the contract.[1] Though a member of the company, the assured stands, so far as relates to any change in the contract made with it, in the same position as a third person would stand, unless the by-laws otherwise provide.

Though after the insurance the insured is bound by the rules of the company, and the company's agent is his agent, this is not the case until the insurance is actually effected.[2] The books of a mutual company are as much the books of the assured as of the other members, and are evidence against him.[3] He is bound to know the by-laws of the company.[4] But the admissions of corporators or officers of a mutual company are not binding upon all its members.[5] A member of a mutual company cannot object to the regularity of the incorporation or formation of the company.[6]

§ 427. **Premium Notes.**—In mutual companies a note is frequently taken for a portion of the premium, though the present tendency is to pay the entire amount in cash. A power to make insurances involves a power to take such notes which may be negotiated to *bona fide* holders, who

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[1] Ins. Co. v. Connor, 17 Penn. 136; Beadle v. Chenango Co. Mut. (F.) Ins. Co. 3 Hill, 161; Great Falls Mut. F. Ins. Co. v. Harvey, 45 N. H. 292; N. E. Mut. F. Ins. Co. v. Butler, 34 Me. 451.

[2] Cumb. Val. Mut. Prot. (F.) Co. v. Schell, 29 Penn. 31; Columbia (F.) Ins. Co. v. Cooper, 50 Penn. 331. *Contra:* Susquehanna (F.) Ins. Co. v. Perrine, 7 W. & S. 348; Belleville (F.) Ins. Co. v. Van Winkle, 1 Beasley, 333.

[3] Diehl v. Adams Co. Mut. (F.) Ins. Co. 58 Penn. 443.

[4] Simeral v. Dubuque Mut. (F.) Ins. Co. 18 Iowa, 319; Coles v. Iowa State Mut. (F.) Ins. Co. 18 Iowa, 425; Treadway v. Hamilton Mut. (F.) Ins. Co. 29 Conn. 68.

[5] Hackney v. Allegheny Co. Mut. (F.) Ins. Co. 4 Penn. 185.

[6] Sands v. Hill, 42 Barb. 651; Traders' Mut. F. Ins. Co. v. Stone, 9 Allen, 483; Citizens' Mut. (F.) Ins. Co. v Sortwell, 8 Allen, 217.

can recover thereon,[1] though this power, is usually limited by the language of the note, which is such as to constitute notice to all persons of its object and the conditions upon which alone it is payable.[2] A mutual company has inherent power to take notes to constitute a guaranty fund.[3] But under a charter, which authorizes the taking of notes of members for premiums, there is no right to substitute the note of a third party.[4] If the insurance never becomes operative, the note is void.[5]

§ 428. **Assessments upon Notes.**—If the cash premium paid is not sufficient to enable the company to meet its expenses and losses, the members become liable to assessment upon their notes. In such case the maker of a premium note is liable for his proportion of all losses which occur while his policy is in force,[6] and he cannot defend on the ground of want of insurable interest.[7] Where some premium notes are not collectable, the makers of the good ones are liable to pay the deficiency.[8] The intentional omission from assessment of some of the members liable thereto, renders it void, though the amount to be paid by the omitted members is computed, and it is intended to enforce it at a later period.[9] But slight unintentional errors do not invalidate an assessment. An assessment laid for losses and expenses which in part occurred before persons became members is void as to them, though good as to others.[10] In estimating the sum to be assessed interest on borrowed money and probable expenses, discount and losses

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[1] Farmers' Bank of Saratoga v. Maxwell, 32 N. Y. 579; White v. Haight, 16 N. Y. 310; McIntire v. Preston, 5 Gilm. 48.

[2] Savage v. Medbury, 19 N. Y. 32.

[3] Hope Mut. L. Ins. Co. v. Perkins, 28 N. Y. 404; *Ib.* v. Weed, 28 Conn. 50.

[4] Mut. Ben. L. Ins. Co. v. Davis, 2 Kern. 569.

[5] Lynn v. Gaynor, 13 B. Mon. 400.

[6] Sands v. Hill, 42 Barb. 651. [7] N. E. Mut. F. Ins. Co. v. Belknap, 9 Cush. 140.

[8] Bangs v. Gray, 2 Kern. 477.

[9] Marblehead Mut. F. Ins. Co. v. Hayward, 3 Gray, 208; People's Mut. Eq. Ins. Co. v. Arthur, 7 Gray, 267. And see Mut. Ben. L. Ins. Co. v. Jarvis, 22 Conn. 133; *ante*, § 418.

[10] Long Pond Mut. F. Ins. Co. v. Houghton, 6 Gray, 77.

in collection may be taken into account,[1] as may premiums on surrendered and cancelled policies,[2] but the allowance for such purposes must be reasonable.[3]

In an action for an assessment, it must affirmatively appear not only that losses have occurred, but that the assessment has been legally made.[4] If a company or its receiver allows claims against the company, even though payment might have been refused on some technical grounds, the makers of the premium notes are liable, and cannot contest the legality of the claims,[5] though in a proper case they may defend by showing that the claims were wholly fictitious, or were fraudulently allowed.[6]

An assessment may be made upon a premium note after a policy expires for losses which occurred before the expiration.[7] Though a policy is by its terms to be rendered void by an assignment, the assured remains liable to contribute to all losses which happened while the policy was in force, though the assessment is not made till afterwards.[8] After a company has, in an action, denied liability, on the ground that the policy had become void, it cannot recover on the premium note for any losses which occurred after the date of forfeiture.[9] An assessment made after an assignment which forfeits the policy, for losses which occurred before, does not revive the policy.[10] But an assessment enforced after knowledge of facts constituting a forfeiture, for losses occurring after the forfeiture, is a waiver;[11] but it is not so if

[1] Jones v. Sisson, 6 Gray, 288; Bangs v. Gray, 2 Kern. 477.

[2] Fayette Mut. F. Ins. Co. v. Fuller, 8 Allen, 27.

[3] *In re* People's Mut. Eq. F. Ins. Co. 9 Allen, 319; People's Eq. Mut. F. Ins. Co. v. Babbitt, 7 Allen, 235.

[4] Atlantic Mut. F. Ins. Co. v. Fitzpatrick, 2 Gray, 279; May on Ins. 699.

[5] Sands v. Hill, 42 Barb. 651. [6] People's Mut. (F.) Ins. Co. v. Allen, 10 Gray, 297.

[7] St. Louis Mut. F. & M. Ins. Co. v. Boeckler, 19 Mo. 135; Atlantic (F.) Ins. Co. v. Goodall, 35 N. H. 328.

[8] Smith v. Saratoga Co. Mut. F. Ins. Co. 3 Hill, 508.

[9] Tuckerman v. Bigler, 46 Barb. 375.

[10] Smith v. Saratoga Co. Mut. F. Ins. 3 Hill, 508.

[11] Viall v. Genesee Mut. (F.) Ins. Co. 19 Barb. 440; Sands v. Hill, 42 Barb. 651; Ins. Co. v. Slockbower, 26 Penn. 199; *contra*, Philbrook v. N. E. Mut. Ins. Co. 37 Me. 137.

made for a loss occurring before forfeiture,[1] or in ignorance of the forfeiture;[2] and it seems that an assessment made for losses occurring after forfeiture cannot be enforced.[3]

An agreement to cancel a note and surrender a policy, in consideration of the payment of an undisputed assessment, is void as being without consideration.[4] But if the directors compromise suits upon premium notes and surrender the notes, a subsequent action cannot be maintained for assessments for other losses which occurred before the surrender.[5] And where the charter gives a right, on parting with the interest, to cancel the policy, on payment of the proportion of losses occurred at the time, the company is bound, in the absence of fraud, by a settlement then made, even though in fact nothing was paid.[6] The surrender of a policy by the insured and its cancellation by the company dissolves the relation, and the company has no further claim upon him for unpaid assessments previously made. If the policy is cancelled the note falls with it.[7] If the policy is void for misrepresentation, the note is said to be void for want of consideration.[8] If the maker of the note is discharged in bankruptcy, the policy lapses.[9]

In an action on an assessment on a premium note the plaintiff is not entitled to interest upon the amount of the note, where the whole amount of the note is enforced as a penalty for not paying an assessment of a part,[10] but interest may be recovered on a partial assessment.[11]

The insolvency of the company is no defense to an action

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[1] Viall v. Genesee Mut. (F.) Ins. Co. 19 Barb. 440.

[2] Allen v. Vermont Mut. F. Ins. Co. 12 Vt. 366; Finley v. Lycoming Co. Mut. Ins. Co. 30 Penn. 311.

[3] Tuckerman v. Bigler, 46 Barb. 375; Smith v. Saratoga Co. Mut. F. Ins. Co. 3 Hill, 500.

[4] Sands v. Hill, 42 Barb. 651.

[5] Wadsworth v. Davis, 13 Ohio St. 123.

[6] Hyde v. Lynde, 4 Comst. 387.

[7] Campbell v. Adams, 38 Barb. 132. But see N. E. F. Ins. Co. v. Butler, 34 Me. 451.

[8] Frost v. Saratoga Mut. (F.) Ins. Co. 5 Denio, 154.

[9] Reynolds v. Mut. F. Ins. Co. 10 Am. Law Reg. N. S. 715.

[10] Bangs v. McIntosh, 23 Barb. 159; Bangs v. Bailey, 37 Barb. 630.

[11] Hyatt v. Wait, 37 Barb. 29.

on a premium note.[1] The policy and the note are independent contracts, and a neglect of one party to perform does not absolve the other.[2] In case of insolvency, a loss, adjusted and payable by the company, cannot be set off against a liability for premiums. The latter are a fund which must be divided *pro rata* among all creditors.[3] And after insolvency and cancellation of all policies the right and duty to assess remains.[4]

A vote that if assessments are not paid insurance previously made should be suspended, is not valid in the absence of a by-law giving that power.[5] Under a power to annul policies for non-payment of assessments, directors may declare the insured excluded from all benefit of his insurance during the continuance of his default, but at the same time hold him for subsequent assessments, for the reason that, under the rules, they have a right to collect the whole amount of the note if they absolutely annull the policy.[6] Where the by-laws provide that the note shall be suspended while an assessment remains unpaid, the imposition and collection of a subsequent assessment does not waive the exemption of the company from a liability produced by the non-payment of the previous assessment.[7]

§ 429. **Waiver.**—It has been said that, though a forfeiture of the policy may be waived, yet, in a mutual company, the assured all occupy the position of partners, and each is the agent of the other, and that in reference to a company of that description waiver cannot be predicated.[8]

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[1] Sterling v. Mercantile Mut. (F.) Ins. Co. 32 Penn. 75; Alliance Mut. (M.) Ins. Co. v. Swift, 10 Cush. 433; Hone v. Boyd, 1 Sandf. 481.

[2] New Eng. Mut. F. Ins. Co. v. Butler, 34 Me. 451.

[3] Lawrence v. Nelson, 21 N. Y. 158.

[4] Comm. v. Mass. M. F. Ins. Co. 8 Ins. Law Jour. 24, and cases there cited.

[5] New Eng. Mut. F. Ins. Co. v. Butler, 34 Me. 451.

[6] Coles v. Iowa State Mut. (F.) Ins. Co. 18 Iowa, 425.

[7] Nash v. Union Mut. (F.) Ins. Co. 43 Me. 343. Many cases beside those cited are to be found in the reports relating to assessments, but it is not deemed useful to refer to them more in detail.

[8] Mitchell v. Mutual Life Ins. Co. of N. Y. Superior Ct. of Baltimore. Not reported.

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